TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 304

[redacted]

PLAINTIFF IN ERROR,

vs.

[redacted]

IN ERROR TO THE [redacted]

31076

(18,545.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 336.

MEXICAN CENTRAL RAILWAY COMPANY (LIMITED), PLAINTIFF IN ERROR,

vs.

J. M. DUTHIE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

INDEX.

	Original	Print.
Caption	1	1
Plaintiff's original petition	1	1
Original citation	20	13
Marshal's return	23	15
Exception to citation	23	15
Order sustaining exception to citation	27	17
Waiver of service	27	18
Defendant's original answer	28	18
Plaintiff's first amended original petition	29	19
Verdict	41	26
Judgment	41	27
Order extending time to file bills of exceptions	42	28
Motion of plaintiff for leave to amend pleadings	43	28
Order permitting amendment of pleadings	44	29
Defendant's first, second, and third bills of exceptions	45	30
First amended original petition	45	30
Original petition as to all jurisdictional averments	57	37
Original answer	58	38
Order overruling demurrer	59	38
Verdict	59	39
Judgment	60	39

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	Original.	Print
Motion for leave to amend petition	61	40
Order granting leave to amend, &c.	62	40
Judge's certificate to bills of exceptions	64	41
Order of court as to certificate of jurisdiction	64	42
Certificate of jurisdictional questions	65	42
First amended original petition	65	43
Original petition as to all jurisdictional averments	77	50
Original answer	78	51
Order overruling demurrer	79	51
Verdict	79	51
Judgment	80	52
Motion for leave to amend petition	81	52
Order granting leave to amend, &c.	82	53
Questions certified	84	54
Defendant's assignment of errors	85	55
Defendant's petition for writ of error	86	56
Original writ of error	88	56
Original citation and service	89	57
Clerk's certificate	90	58

1 *Caption.*

Be it remembered, that there was opened and begun to be holden a regular term of the United States circuit court for the western district of Texas, at El Paso, Texas, on the 7th day of April, A. D. 1902, it being the first Monday in said month and the day fixed by law for commencing a regular term of said court at said place.

Present: The Honorable T. S. Maxey, United States district judge; Honorable Henry Terrell, United States district attorney; George L. Siebrecht, United States marshal for said district, and D. H. Hart, clerk of said court; when and where the following proceedings, among others, were had, to wit:

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 297.

Plaintiff's Original Petition.

Filed August 29, 1901.

THE UNITED STATES OF AMERICA:

To the hon. circuit court for the western district of the State of Texas, at its October term, 1901, held at El Paso, Texas:

THE STATE OF TEXAS,
County of El Paso,
Western District of the State of Texas.

To the Hon. T. S. Maxey, judge of said court:

2 Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State, and is a citizen of said State and of the United States of America. That defendant is a railway or railroad corporation, duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife Francis A. Duthie and their minor son.

That on the 22nd day of July, 1901, at El Paso, Texas, at a cost of about eleven dollars, plaintiff purchased of defendant through its agents, representatives or clerks, transportation for himself, his wife and their child from El Paso to the city of Chihuahua in the Republic of Mexico, and on said date boarded and took passage, with his wife and child, at El Paso upon one of defendant's passenger trains for Chihuahua in said Republic and which said train was then in charge and control and under the management of defendant and its employés and servants. That on said July 22nd, 1901, at a station or place on defendant's line of railroad, in the said Republic of Mexico, called Ojo Caliente, plaintiff and his wife were,

3 through the negligence, want of ordinary care and diligence on the part of defendant and its servants and employés in charge of and managing said passenger train, greatly and seriously personally injured.

Plaintiff says that when said train arrived at said place or station, for some reason unknown to plaintiff, the train of passenger cars upon which he, his wife and child were passengers, and which train consisted of several coaches, plaintiff is unable to say how many, or cars in which passengers usually travel and such other cars, locomotive, etc., as usually compose and make up a passenger train, was at said Ojo Caliente disconnected, that is to say, one of the coaches or cars was disconnected or taken out of said train temporarily, but for what purpose plaintiff does not know, however, said car or coach was for a short while left standing alone upon the track wholly disconnected from the balance of the train, shortly thereafter the remainder of said train, which had been pulled off some distance from said coach or car, was backed down to where said coach or car was left standing for the apparent purpose of coupling on to said coach or car, at any event that part of the train to which the locomotive was attached backed down to and against said car, but instead of coupling onto said car ran against and pushed said car backward and started the same off down the track, which was down grade. Plaintiff says that if it was the object of defendant's servants and employés to run down to and couple that part of the train to which the locomotive was attached to said car that the same was negligently, carelessly and without the exercise of reasonable and ordinary care done, for the reason that said part of the train to which the locomotive was attached was backed down at so great a rate of speed that when that part of the train came in contact with the standing car the force of contact and jar was so great that the coupling failed to catch and hold or having caught was again jarred loose and disconnected.

4 Plaintiff says that said car when run against and started off down the track continued to run on down said track and as it proceeded its speed increased to a rate of twenty-five to thirty miles an hour and said car ran off down the track for a distance of about six miles, that after said car had proceeded some distance down the track, say a half a mile, that part of the train to which

the locomotive was attached was by the employés, agents and servants of defendant started down the track in pursuit of said car and for the apparent purpose of catching same and finally did catch and run and crash into said car.

That when said part of the train was backed down to said car for the apparent purpose of coupling thereto, plaintiff was on the coach or car in front of said part of said train, the same going backward at the time, and his wife and child were on said car left standing, and plaintiff was still on said front car or part of that part of the train to which the locomotive was attached when said part of said train was run and crashed into said car upon which plaintiff's wife and child still were.

That when said part of said train to which the locomotive was attached started out to catch said car, which had theretofore been started off by itself, and was apparently at the time said part of the train to which the locomotive was attached started in pursuit running wild, and appeared to be beyond control, said part of said train was started in pursuit at a high rate of speed which was increased as said part of said train continued the pursuit of said wild car; that finally said part of said train caught up with said car.

That plaintiff was then near the door or on the platform of the front car, that is to say, the car of the pursuing cars, which was in front backing down upon said wild car; that when said pursuing cars or train caught up with said wild car the pursuing train dashed and crashed into said wild car with tremendous force and with force sufficient to wreck and demolish the ends of the cars coming in contact; that by reason of the force with which said cars came together and crashed into each other and the shock and sudden jar thereby caused, plaintiff was thrown or fell in between said cars and was greatly and seriously damaged and injured; that plaintiff's wife, who was in said wild car, was by said force and shock thrown out of the seat in which she was sitting, over the seat in front and greatly and seriously bruised and injured.

Plaintiff says that he was caught between the cars and pinioned there; that in extricating himself, which he finally with great pain and suffering did, his shoes were pulled from his feet and left sticking between said cars where he had been pinioned and held by his legs and feet, that his legs and feet were caught and held in between said cars and badly and seriously mashed, bruised and injured; that he was also wounded, bruised and mashed in his arms, shoulders, back, head and spine, in fact was bruised, beat and mashed all over his body so that he suffered and continued for many days thereafter to suffer most excruciating pain and soreness; that as a consequence of his injuries he, for more than a week thereafter, suffered great bodily pain and was unable on account thereof to sleep and rest; that he was for about twenty-five days, on account of his said injuries, confined to his bed, that for more than a week he was unable to turn his body or move in bed without great inconvenience, annoyance, pain and physical suffering; that for more than thirty-five days after

the accident he was unable to sustain any weight or to stand erect upon either of his feet; that he is still unable to bear his weight upon his right foot and is now compelled to use crutches to go about on foot; that his right foot and leg still continues and will for many months continue to be in a crippled, sore and painful condition, and plaintiff, if he is ever able, will not for many months be able to use his right leg and foot except with the aid of crutches; that said right leg is now in a crooked and deformed condition,
6 that the same was caused by the injuries received at the time of and in said accident, and plaintiff believes that said injuries to his right leg are and will remain permanent and that he will not ever again be able to use said right leg, nor can the same ever be restored to the same strength and usefulness as before it was injured as aforesaid. That for several days after plaintiff received the injuries and bruises aforesaid, he suffered great physical pain and as a result of said injuries and the shock to his mind and general nervous system from said collision and accident was very sick and came near losing his life and was in much fear that he would die as a result of his said injuries and was thereby caused to suffer and did suffer in addition to the physical pain and torture, great mental pain, fear and anguish; that ever since said injuries plaintiff has continuously suffered more or less physical pain in his legs, arms and shoulders, and especially has he continued to suffer much pain in his right leg and ankle, which is still in a disabled, crippled and deformed condition and permanently injured.

Plaintiff says that on account of his said injuries he has been compelled to lose much time, having already lost thirty days, and that he will be compelled to lose at least six months more, during which time he has been unable and will still be unable to work or follow his usual occupation and business; that his time is reasonably worth to him ten dollars per day; that in time already lost and the time he will lose, on account of his said injuries, he has been damaged in the sum of twenty-one hundred dollars.

That on account of the serious personal bodily injuries done to him, as aforesaid, the physical pain and suffering which he has endured and undergone in consequence thereof and on account of the mental pain and anguish endured and suffered as a result of said injuries he has been damaged in the sum of ten thousand dollars.

7 Plaintiff further sues herein for injuries done to his wife, Francis A. Duthie, at the same time and place and says that at the time said cars crashed together his wife was in the car hereinbefore designated as the car left standing and the wild car; that she was thrown out of the seat where she was sitting and pitched head foremost out of said seat over the back of another seat and onto the floor of the car, falling on and striking the floor with her head so that she was stunned and rendered unconscious and for a considerable time thereafter remained unconscious, and had to be assisted out of said car. That for several days thereafter she suffered severe pain and soreness in her head and neck and shoulders and was for several days confined to her bed as a result of said injuries. Plain-

tiff says that his wife has been permanently injured as a consequence of being violently thrown upon her head against the floor of the car, in this, that before said accident she was at times subject to fainting spells or epilepsy, but that since her said injuries said fainting spells or epileptic fits are of much more frequent occurrence than formerly and her suffering therefrom correspondingly increased, and that the frequent recurrence of such fainting spells or epileptic fits is the result of her said injuries and her being thrown upon her head upon the floor of said car.

That as a result of said injuries and the physical pain as well as mental suffering, pain and anguish suffered by her, and on account of the permanent injury to her health by causing the more frequent recurrence of said fainting spells or epileptic fits plaintiff is entitled to recover of defendant for the benefit of the community estate of himself and wife damages in the sum of five thousand dollars as actual damages for the physical pain and mental suffering and anguish suffered by her and for the permanent injury done to her health as aforesaid.

Plaintiff further says that each and all of the wrongs and
8 injuries done to him as well as his wife were caused through the negligence and want of ordinary care and diligence upon the part of defendant and its servants and employés in this:

First. When said car or coach was left standing upon the track defendant and its servants and employés, when the remainder of the train was backed down to be coupled onto said car, negligently and carelessly and without the exercise of ordinary care backed said train down at a much greater rate of speed than was necessary and proper to make the coupling and came against said car with such force that if the couplings were so arranged or prepared as to ordinarily effect a coupling then the couplings were by the force and jar with which said train was backed against said car thrown loose and said car started on down the track.

Second. Plaintiff says that before said train backed down to said car for the purpose of coupling thereto defendant and its servants and employés in charge of said train negligently, carelessly and without the use of ordinary care and diligence failed to properly prepare and adjust the couplings to said cars so that when they came together the couplings would catch and hold, that if said couplings had been properly set, prepared and adjusted then said cars would have coupled together and the accident averted.

Third. That defendant and its servants and employés when said car was left standing upon the track negligently, carelessly and without the exercise of ordinary care and diligence failed to provide and have said car equipped with proper and necessary appliances to prevent said car from moving and to set and leave set the brakes or apparatus for preventing said car from moving, that if said car had been properly provided and equipped with and said brakes or apparatus had been properly set and such apparatus properly attended to, then, although when the other part of the train backed down and against said car and failed to effect a coupling,
9 nevertheless said car could not have run off in the way it did, but would have moved only a short distance and stopped.

Fourth. That at the time said car started off down the track the servants and employés that were on said car, and plaintiff says there were servants and employés of defendant aboard of said car, through ignorance, unskillfulness, fright or some other unjustifiable cause were unable to control said car and to stop the same, and failed, for the reason either that they did not know how or the appliances for stopping said car were out of order to stop said car, wherefore defendant is guilty of negligence and want of ordinary care and diligence in the selection of its servants and employés placed in charge of said car or who were upon the same when it ran off. And if in fact said servants and employés were skillful and no want of ordinary care or negligence can be imputed to defendant in *their* selection and employment, then defendant was nevertheless guilty of negligence and want of ordinary care and prudence in that the appliances with which said car was equipped and provided for stopping and holding same were inferior, insufficient and unsafe or in such defective condition as not to be available for the use for which they were intended, and that they were inferior, insufficient and unsafe and in such defective condition was known or by the use of ordinary care and diligence could have been known to defendant.

Fifth. Plaintiff says that when that part of the train backed down to couple to said car and failed to make such coupling that the servants and employés of defendant, instead of then following said car with said part of said train and coupling onto and stopping said car, negligently and carelessly and without exercising the ordinary care and diligence that the occasion demanded permitted said car to run off and get from a half to a mile away before starting after it, when, if when the first attempt and failure to couple thereto was made said part of the train with the locomotive attached had followed up said car the same by the use of proper ordinary care and diligence could have been coupled onto and stopped or at least gotten under control in some way and the accident that resulted in the serious and great injuries done to plaintiff and his wife, as aforesaid, been averted and avoided.

Sixth. That when said car was about a half mile off and going at an increasing rate of speed of — miles an hour defendant's servants and employés in charge of and operating the other part of the train started out to catch said car, or judging from the result of the race, to run said car down, and said servants and employés negligently and carelessly and without exercising ordinary care and diligence failed to watch and observe the speed of the runaway or wild car and so regulate the speed of the chasing train as to approach said wild car gradually and without doing damage thereto or to the passengers upon said car and upon said chasing train, but negligently and carelessly rushed down upon said car at a great rate of speed and consequently crashed into same as hereinbefore set out, and thereby caused the injuries hereinbefore alleged.

Seventh. That defendant was guilty of culpable negligence and want of ordinary care in selecting and employing its servants and employés in charge of said train of cars; that said servants and employés were inefficient, incompetent and unskilled in the manage-

ment and handling of trains of cars and in this instance acted in a most inefficient, incompetent and unskilled manner, and the accident which resulted in the injuries herein complained of was the result of the inefficiency, incompetency and unskillfulness of said servants and employés handling and operating said passenger train and cars; that such inefficiency and unskillfulness of said servants and employés is shown in the fact that said car was left on the track without having the brakes so set as to prevent its running away, in the inability to stop said car after after it had been started, in the failure
11 to have the couplings so prepared and adjusted as to effect a coupling when the first attempt to couple thereto was made, in the failure to at once follow up said car and couple thereto when they failed to couple the first time, and in running the other part of the train down upon said car without so regulating the speed of the chasing part of the train as to approach said car and catch the same without crashing into it, and in divers other ways as shown by the allegations of negligence hereinbefore set out was the inefficiency, incompetency, and unskillfulness of said servants and employés shown and that they were inefficient, incompetent and unskillful was well known to defendant or by the exercise of reasonable care and diligence could have been known to defendant.

Plaintiff says that defendant was negligent in the discharge of its obligations and duties as a common carrier to plaintiff and his wife as passengers upon its said passenger train under each and all of the foregoing seven counts charging negligence and that the said injuries of himself and wife were the result of such negligence and if upon trial hereof it be found that defendant is chargeable with negligence in either or all of said counts then plaintiff should recover against defendant actual damages in the sum of twelve thousand one hundred dollars for injuries by him sustained and for the benefit of the community estate of himself and wife the sum of five thousand dollars actual damages on account of the injuries done to her.

Plaintiff says that the said injuries to himself and wife accrued through no fault or negligence upon the part of himself and wife or either of them that in any manner contributed thereto, but were the result of the negligence and want of ordinary care and diligence upon the part of defendant, its servants and employés.

That under the laws of the Republic of Mexico as the same then existed and now exist, as well as under the laws of the
12 United States of America and the State of Texas, the facts herein stated present a good cause of action against defendant and thereunder plaintiff is entitled to recover his damages, and he specially pleads as a part of this petition the laws of the Republic of Mexico applicable to the issues hereby tendered; said laws of Mexico being as follows, to wit:

From the Federal Constitution of the Mexican United States.

Art. 72. Congress has power * * * (22) to enact laws governing the general lines of communication, and governing post-offices and mails.

Art. 97. The federal courts have jurisdiction (1) of all questions growing out of the execution and application of the federal laws except when the application of the law only effects interests of individuals in which case the local judges and tribunals of the State shall entertain jurisdiction.

From the Federal Penal Code of Mexico.

Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands.

Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

Art. 6. There are intentional crimes and crimes resulting from neglect.

Art. 11. Negligent crimes exist (1) where an act is done or a duty omitted which although lawful in itself is not so by reason of its consequences if the accused fails to provide against such consequences through negligence, want of reflection or care by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not
13 profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved: If the accused is ignorant of such circumstances through not having previously made the investigation which the duty of his profession or the importance of his case demands.

Penal Code, Book 2—Civil liability in criminal matters.

Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization and (4) payment of judicial expenses.

Art. 304. Reparation comprehends: the payment of all the damages caused to the injured party, to his family or to a third person, for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence.

Art. 305. Indemnization imports: the payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal existing and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

Art. 306. The condition required by the two preceding articles,

that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued: If they proceed directly from and as a necessary consequence of the same act or omission from which resulted the previous damages or injuries.

14 Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit.

Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

Art. 309. The judges who adjudicated upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend, on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

Art. 310. The right of civil responsibility forms part of the estate of a decedent and descends to his heirs and successors, provided, it be not the case of the following article, or that it arise from injury or defamation, and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 315, as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life.

Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed. * * *

Art. 321. In case of blows or wounds, from which the in-
15 jured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to

earn in his new employment falls short of his daily earnings in his former occupation.

Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed or deformed, by that circumstance, he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed.

Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

16 Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law unless it be proven: That the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.

Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327 it is an indispensable condition that the acts or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed.

Art. 331. Under the condition of the preceding article, those liable are * * * railroad companies.

Art. 363. Limitation: The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the civil code or the commercial code, according to the nature of the demand and the subject-matter treated of.

Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, of indemnity for injuries, or for payment of judicial expenses the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

17 Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew.

Transitory Law, Penal Code.

Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceedings in the former shall be stayed.

From the Federal Civil Code.

Art. 9. Against the observance of the law, disuse, custom, or practice to the contrary cannot be alleged.

Art. 20. When a judicial controversy can be decided neither by the text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

Art. 21. In case of conflict of rights and the absence of express law for the especial case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided observing the greatest equality possible between the parties.

Art. 1095. Limitation bars in three years: * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such per-
18 sons or the owners of the animals.

Act of Congress of December 15, 1881.

Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed, upon Mexican territory, according to the following bases: (1) Railroads, telegraphs and telephones which in the federal district and territory of Lower California unite together two or more municipalities, or the federal district and territory of Lower California with one or more States; those which communicate two or more States with each other; those which touch at any point in the territorial boundary line of the Republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively

to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * (*g*.) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operations of the lines. (*h*.) Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service, and for accidents or mishaps in the operation.

From the regulations for the construction, maintenance, and operation of railroads.

Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

Art. 53. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman.

19 Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: * * * Three blasts or sounds of the whistle shall be the signal that the entire train is going to move backward.

Art. 124. Companies (railroad) are liable for accidents which occur through the failure to observe the provisions of this chapter (chapter 7) respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals.

Art. 194. Companies (railway) are liable for all faults or accidents which occur through tardiness, negligence, imprudence or want of capacity of their employés.

Art. 298. All violations of this law, which companies (railway) commit shall be subject to punishment by the administration by fine up to five hundred dollars, which the department of public works shall assess reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them.

Plaintiff further alleges that by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth, he had at the time of the occurrence of the accident hereinbefore mentioned, and now has, a right of action for his damages against the defendant in the Republic of Mexico, and the same now exists in said country as well as in the United States of America for the injuries done as aforesaid to himself and his wife. And he says that the acts of negligence upon the part of the defendant were wrongful and actionable, as has been hereinbefore shown by the plaintiff, in the Republic of Mexico, at the time of the accident complained of, and are now so, and he says the same were then and are

20 now wrongful and actionable in the United States of America and in the State of Texas and that under the laws of the several countries and governments aforesaid he ought to recover his damages as hereinbefore asked; wherefore plaintiff prays for cita-

tion to defendant in terms of law, and that upon hearing had that he recover of defendant his actual damage in the sum of seventeen thousand one hundred dollars together with all costs in this behalf expended and that he have all such further relief general and special as he may in law and equity be entitled to; as in duty bound will ever pray.

THURMOND & RUSSELL,
Attorneys for Plaintiff, J. M. Duthie.

(Endorsed:) No. 297. J. M. Duthie *vs.* The Mexican Central Railway Co., Limited. Suit for damages for personal injuries. Plaintiff's original petition. Filed Aug. 29th, 1901. D. H. Hart, clerk, by J. P. Hodgson, deputy. Thurmond & Russell, att'ys for plaintiff.

Original Citation.

Issued August 29, 1901; filed August 30, 1901.

Citation in circuit court.

UNITED STATES OF AMERICA,
Western District of Texas, at El Paso, Texas.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon The Mexican Central Railway Company, Limited, a resident citizen of the county of El Paso in the western district of Texas, if to be found therein, to be and appear before the honorable circuit court of the United States, at a court to be holden in and for said district, at El Paso, Texas, on the first Monday, being the 7th day of October, A. D. 1901,
21 and the first day of the next regular term of said court in course, to answer a petition and complaint exhibited and filed in said court on the 29th day of August, A. D. 1901, in a suit numbered on the docket of said court No. 297, wherein J. M. Duthie is plaintiff, and The Mexican Central Railway Company, Limited, is defendant.

The nature of plaintiff's demand is as follows, to wit: Plaintiff sues for damages for personal injuries to himself and his wife, Francis A. Duthie. Alleging that he and his wife were passengers on a passenger train on the Mexican Central railroad on the 22d of July, 1901, and through the negligence of defendant, its servants and employés were injured at a station on defendant's line of railway called Ojo Caliente in the Republic of Mexico. That when the train arrived at said station one of the cars or coaches was disconnected or taken out of the train and left standing on the track. That afterward the remainder of the train was run against said car and started it off down the track and that said car ran off and could not be stopped, that its speed increased to twenty-five to thirty miles per hour, that after it had gone about a half mile, running wild, down the track, the remainder of the train with the engine attached was started after it and caught up with and ran and crashed into

said car. That at the time said car was run into he, plaintiff, was on the part of the train that ran into the car and his wife was on said car. That when the cars crashed together he was thrown and caught between them and his legs and feet pinioned between the cars. That his legs were bruised, mashed and injured. That he was injured in his arms, shoulders, and his body generally bruised and mashed. That his wife was thrown out of the seat in which she was sitting over another seat and onto the floor, striking the floor of the car on her head, whereby she was rendered and remained for a time unconscious. That they have both suffered great physical pain and injury as well as mental pain and anguish. That he has lost time reasonably worth to him ten dollars per day and for
22 at least six months will be unable to pursue his occupation and business. That he is permanently injured in his right leg. That his wife has been permanently injured. He charges that defendant and its servants were negligent in leaving said car on the track not provided, equipped and so arranged as not to run off when run against by the other part of the train. That the attempted coupling was negligently and without due care and prudence made. That when the car was left standing the brakes and appliances for stopping and holding the car were not properly adjusted. That the servants of defendant were unskillful and inefficient and failed to stop said car after it started, that they negligently failed to follow up the car and couple thereto when it first started off. That when the servants of defendant with the other part of the train started out to catch the car, instead of regulating their speed as they approached said car, negligently ran into said car and that the servants and employés were incompetent and unskilled. Plaintiff sues for actual damages in the sum of seventeen thousand one hundred dollars. He alleges his residence to be El Paso, Texas, that the defendant is chartered under the laws of and is a citizen of the State of Massachusetts and owns and operates a line of railway from El Paso, Texas, to the city of Mexico in the Republic of Mexico and that S. R. Comfort is its agent at El Paso, Texas, where it maintains an office. Plaintiff pleads specially the laws of Mexico relating to the subject-matter of the suit. And for further statement of his demand refers to his original petition now on file in the circuit court of the United States of America for the western district of Texas at El Paso, Texas.

And you will deliver to the defendant by delivering to S. R. Comfort, the local agent & representative of defendant at El Paso, Texas, in person a true copy of this writ.

Herein fail not, but have you then and there before said
23 court this writ, with your action thereon, showing how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court hereto affixed, at El Paso, Texas, this 29th day of August, A. D. 1901, and the 126 year of our Independence. Issued same day.

[SEAL.] D. H. HART,
Clerk of said Court,
By J. P. HODGSON, *Deputy.*

Marshal's Return.

EL PASO, TEXAS.

Received this writ on the 29th day of August, A. D. 1901, and executed the same on the 29th day of August, A. D. 1901, by delivering in person at El Paso, Texas, in my district, a true copy of this writ to S. R. Comfort, the local agent representing the Mexican Central Railway Comp., Limited, in El Paso county, Texas.

GEO. L. SIEBRECHT,
U. S. Marshal,
By H. R. HILLEBRAND, *Deputy.*

(Endorsed:) No. 297. U. S. circuit court, W. D. T., at El Paso, Texas. J. M. Duthie *vs.* The Mexican Central R'y Co., Limited. Original citation for defendant. El Paso county. Issued 29th day of Aug., 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy. Filed Aug. 30th, 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Exception to Citation.

Filed October 7, 1901.

In United States Circuit Court, Western District of Texas, at El Paso, October Term, 1901.

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 297.

24 Now, in the above styled and numbered cause, comes the defendant by its attorneys, and says that the citation herein is insufficient in law, in this: That said citation does not correctly state the date of the filing of plaintiff's petition, as provided by law; such citation alleging that plaintiff's petition was filed in said court on the 29th day of October, 1901, as shown by copy of said citation, served upon this defendant, attached hereto and marked "Exhibit A."

Wherefore, defendant prays that service be quashed, and prays for the sufficiency of service upon it.

FALVEY & DAVIS,
Attorneys for Defendant.

Citation in Circuit Court.

UNITED STATES OF AMERICA,
Western District of Texas, at El Paso, Texas.

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon The Mexican Central Railway Company, Limited, a resident citizen of the county of El

Paso, Texas, in the western district of Texas, if to be found therein, to be and appear before the honorable circuit court of the United States, at a court to be holden in and for said district, at El Paso, Texas, on the first Monday, being the 7th day of October, A. D. 1901, and the first day of the next regular term of said court in course, to answer a petition and complaint exhibited and filed in said court on the 29th day of October, A. D. 1901, in a suit numbered on the docket of said court No. 297, wherein J. M. Duthie is plaintiff, and The Mexican Central Railway Company, Limited, is defendant.

The nature of plaintiff's demand is as follows, to wit: Plaintiff sues for damages for personal injuries to himself and his wife, Francis A. Duthie. Alleging that he and his wife were
25 passengers on a passenger train on the Mexican Central railroad on the 22d of July, 1901, and through the negligence of defendant, its servants and employés were injured at a station on defendant's line of railway called Ojo Caliente in the Republic of Mexico. That when the train arrived at said station one of the cars or coaches was disconnected or taken out of the train and left standing on the track. That afterward the remainder of the train was run against said car and started it off down the track and that said car ran off and could not be stopped, that its speed increased to twenty-five to thirty miles per hour, that after it had gone about a half mile, running wild, down the track, the remainder of the train with the engine attached was started after it and caught up with and ran and crashed into said car. That at the time said car was run into he, plaintiff, was on the part of the train that ran into the car and his wife was on said car. That when the cars crashed together he was thrown and caught between them and his legs and feet pinioned between the cars. That his legs were bruised, mashed and injured. That he was injured in his arms, shoulders, and his body generally bruised and mashed. That his wife was thrown out of the seat in which she was sitting over another seat and onto the floor, striking the floor of the car on her head, whereby she was rendered and remained for a time unconscious. That they have both suffered great physical pain and injury as well as mental pain and anguish. That he has lost time reasonably worth to him ten dollars per day and for at least six months will be unable to pursue his occupation and business. That he is permanently injured in his right leg. That his wife has been permanently injured. He charges that defendant and its servants were negligent in leaving said car on the track not provided, equipped and so arranged as not to run off when run against by the other part of the train. That the attempted coupling was negligently and without due care and
26 prudence made. That when the car was left standing the brakes and appliances for stopping and holding the car were not properly adjusted. That the servants of defendant were unskillful and inefficient and failed to stop said car after it started, that they negligently failed to follow up the car and couple thereto when it first started off. That when the servants of defendant with

the other part of the train started out to catch the car, instead of regulating their speed as they approached said car, negligently ran into said car and that the servants and employés were incompetent and unskilled. Plaintiff sues for actual damages in the sum of seventeen thousand one hundred dollars. He alleges his residence to be El Paso, Texas, that the defendant is chartered under the laws of and is a citizen of the State of Massachusetts and owns and operates a line of railway from El Paso, Texas, to the city of Mexico in the Republic of Mexico and that S. R. Comfort is its agent at El Paso, Texas, where it maintains an office. Plaintiff pleads specially the laws of Mexico relating to the subject-matter of the suit. And for further statement of his demand refers to his original petition now on file in the circuit court of the United States of America for the western district of Texas at El Paso, Texas.

And you will deliver to the defendant by delivering to S. R. Comfort, the local agent & representative of defendant at El Paso, Texas, in person a true copy of this writ.

Herein fail not, but have you then and there before said court this writ, with your action thereon, showing how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court hereto affixed, at El Paso, this 29th day of August, A. D. 1901, and the 126 year of our Independence. Issued same day.

[SEAL.]

D. H. HART,
Clerk of said Court,
By J. P. HODGSON, *Deputy.*

27 (Endorsed:) #297. In U. S. circuit court. J. M. Duthie vs. M. C. R'y Co., Lim. Exception to citation. Filed this 7 day of Oct., 1901. D. H. Hart, clerk. By J. P. Hodgson, deputy. Falvey & Davis, att'ys for def't.

Order Sustaining Exception to Citation.

October 9, 1901.

EL PASO, TEXAS, WEDNESDAY, *Octo. 9th, A. D.* 1901.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } 297.

Be it remembered, that on this the 8th day of October, 1901, there came on to be heard the exception of the defendant to the citation issued herein, and its motion to quash the service thereof.

And the same having been heard by the court and duly considered, it is the opinion of the court that said exception and motion should be in all things sustained and it is accordingly so ordered, and said cause is set for trial for the 1st Wednesday of the April term of this court A. D. 1902.

Waiver of Service.

Filed March 19, 1902.

THE UNITED STATES OF AMERICA:

To the circuit court of the United States of America for the western dist. of the State of Texas, at its April term, A. D. 1902, held at El Paso, Texas:

THE STATE OF TEXAS, }
County of El Paso. }

In the cause of J. M. Duthie against The Mexican Central Railway Company, Limited, No. 297, now pending in said circuit court of the U. S. A. for the western district of the State of Texas.

28 To the Honorable T. S. Maxey, judge of said court:

Now comes The Mexican Central Railway Company, Limited, defendant in the above cause, through its attorneys, and waives service of citation and enters its appearance to the said April term, A. D. 1902, of said court.

FALVEY & DAVIS,
Attorneys for Defendant, Mexican Central Railway Company, Limited.

El Paso, Texas, February 11, 1902.

(Endorsed:) No. 297. J. M. Duthie *vs.* The Mexican Central R'y Co., Limited. Waiver of service. Filed March 19th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Defendant's Original Answer.

Filed April 9, 1902.

In U. S. Cir. Court, April Term, 1902.

J. M. DUTHIE
vs.
M. C. R'Y CO., LIM. } No. 297.

Now comes the defendant in the above styled and numbered cause, and excepting to plaintiff's petition filed herein, *and* says: That same is insufficient in law and fails to state cause of action, and of this the defendant prays judgment of the court.

FALVEY & DAVIS,
Attorneys for said Defendant.

And for further answer in this behalf defendant comes and says: That it denies all and singular the allegations of plaintiff's said petition, and of this it puts itself upon the country.

FALVEY & DAVIS,
Attorneys for said Defendant.

29 (Endorsed:) No. 297. J. M. Duthie *vs.* Mex. Cent. R'y Co., Lim. Defendant's original answer. Filed Ap'l 9, 1902. D. H. Hart, clerk.

Plaintiff's First Amended Original Petition.

Filed March 19, 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIMITED. } No. 297.

Suit pending in the hon. circuit court of the U. S. A. for the western district of the State of Texas, at El Paso, Texas, at its April term, 1902.

In this cause now comes the plaintiff and, with leave of the court first had, files this his first amended original petition in lieu of his original petition filed herein on the 29th day of August, 1901, and says:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State, and is a citizen of said State and of the United States of America. That defendant is a railway or railroad corporation duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an
30 office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife, Francis A. Duthie, and their minor son.

That on the 22nd day of July, 1901, at El Paso, Texas, at a cost of about eleven dollars, plaintiff purchased of defendant through its agents, representatives or clerks, transportation for himself, his wife and their child from El Paso to the city of Chihuahua in the Republic of Mexico, and on said date boarded and took passage, with his wife and child, at El Paso upon one of defendant's passenger trains for Chihuahua in said Republic and which said train was then in charge and control and under the management of defendant and its employés and servants. That on said July 22nd, 1901, at or near a station or place on defendant's line of railroad, in the said Repub-

lic of Mexico, called Moctezuma, plaintiff and his wife were, through the negligence, want of ordinary care and diligence on the part of defendant and its servants and employés in charge of and managing said passenger train, greatly and seriously personally injured.

Plaintiff says that when said train arrived at said place or station, for some reason unknown to plaintiff, the train of passenger cars upon which he, his wife and child were passengers, and which train consisted of several coaches, plaintiff is unable to say how many, or cars in which passengers usually travel and such other cars, locomotive, etc., as usually compose and make up a passenger train, was at said Moctezuma disconnected, that is to say one of the coaches or cars was disconnected or taken out of said train, but for what purpose plaintiff does not know, however, said car or coach was for a short while left standing alone upon the track wholly disconnected from the balance of the train, shortly thereafter the remainder of said train, which had been pulled off some distance from said coach
· or car, was backed down to where said coach or car was left
31 standing for the apparent purpose of coupling onto said coach or car, at any event that part of the train to which the locomotive was attached backed down to and against said car, but instead of coupling onto said car ran against and pushed said car backward and started the same off down the track, which was down grade. Plaintiff says that if it was the object of defendant's servants and employés to run down to and couple that part of the train to which the locomotive was attached to said car that the same was negligently, carelessly and without the exercise of reasonable and ordinary care done, so that such coupling or attempt to couple failed and said car was pushed and started off down the track.

Plaintiff says that said car when run against and started off down the track continued to run on down said track and as it proceeded its speed rapidly increased and said car ran on down the track a considerable distance, a mile or more, that after said car had proceeded some distance down the track that part of the train to which the locomotive was attached was by the employés, agents and servants of defendant started down the track in pursuit of said car and for the apparent purpose of catching same and finally did catch and run and crash into said car.

That when said part of the train was backed down to said car for the apparent purpose of coupling thereto, plaintiff was on the coach or car in front of said part of said train, the same going backward at the time, and his wife and child were on said disconnected car, and plaintiff was still on said front car or part of the train to which the locomotive was attached when said part of said train was run and crashed into said car upon which plaintiff's wife and child still were.

That when said part of said train to which the locomotive was attached started out to catch said car, which had theretofore been started off by itself, and was apparently at the time said part
32 of the train to which the locomotive was attached started in pursuit running wild, and appeared to be beyond control, said part of said train was started in pursuit at a high rate of speed

which was increased as said part of said train continued the pursuit of said wild car; that finally said part of said train caught up with said car.

That plaintiff was then near the door or on the platform of the front car, that is to say, the car of the pursuing cars, which was in front backing down upon said wild car; that when said pursuing cars or train caught up with said wild car the pursuing train dashed and crashed into said wild car with tremendous force and with force sufficient to wreck and demolish the ends of the cars coming in contact; that by reason of the force with which said cars came together and crashed into each other and the shock and sudden jar thereby caused, plaintiff was thrown or fell in between said cars and was greatly and seriously damaged and injured; that plaintiff's wife, who was in said wild and disconnected car, was by said force and shock thrown out of the seat in which she was sitting, over the seat in front and greatly and seriously bruised and injured.

Plaintiff says that he was caught between the cars and pinioned there; that in extricating himself, which he finally with great pain and suffering did, his shoes were pulled from his feet and left sticking between said cars where he had been pinioned and held by his legs and feet; that his legs and feet were caught and held in between said cars and badly and seriously mashed, bruised and injured; that he was also wounded, bruised and mashed in his arms, shoulders, back, head and spine, in fact was bruised, beat and mashed all over his body so that he suffered and continued for many days thereafter to suffer most excruciating pain and soreness; that as a consequence of his injuries he, for more than a week thereafter, suffered great bodily pain and was unable on account thereof to sleep and rest;
33 that he was for about twenty-five days, on account of his said injuries, confined to his bed, that for more than a week he was unable to turn his body or move in bed without great inconvenience, annoyance, pain and physical suffering; that for more than thirty-five days after the accident he was unable to sustain any weight or to stand erect upon either of his feet; that he is still unable to bear his weight upon his right foot and his left foot is still sore and tender and in a swollen condition and he is now compelled to use crutches to go about on foot; that his right foot and leg still continues and will continue to be in a crippled, sore and painful condition, and plaintiff, if he is ever able, will not for many months be able to use his right leg and foot except with the aid of crutches; that said right leg, foot and ankle *is* now in crooked and deformed condition and his left foot is still sore, tender and swollen, that the same was caused by the injuries received at the time of and in said accident, and plaintiff believes and charges that said injuries to his right leg, foot and ankle are and will remain permanent and *the* he will not ever again be able to use said right leg, nor can the same ever be restored to the same strength and usefulness as before it was injured as aforesaid. That for several days after plaintiff received the bruises and injuries as aforesaid, he suffered great physical pain and as a result of said injuries and the shock to his mind and general nervous system from said collision and accident was

very sick and came near losing his life and was in much fear that he would die as a result of his said injuries and was thereby caused to suffer and did suffer in addition to the physical pain and torture and as a result thereof, great mental pain, fear and anguish; that ever since said injuries plaintiff has continuously suffered more or less physical pain in his legs, arms and shoulders, and especially has he continued to suffer much pain in his right leg, foot and ankle which is still in a
34 disabled, crippled and deformed condition and permanently injured; that he has continuously suffered from pain and soreness in his right arm which is and has been ever since receiving said injuries in a partially helpless condition, and plaintiff says that — has become afflicted with rheumatism in said right arm and in his shoulders, that he has been compelled to have the attendance, advice and ministration of physicians to attend upon him continuously since his injuries, and that he is advised by his physicians and believes that he now has rheumatism in his said arm and shoulders, and plaintiff never within his knowledge has before been subject to or had an attack of rheumatism, that he is forty-eight years of age and has prior to his said injuries been of stout, robust and perfect health, and he says the condition of his said arm and shoulders is the result of said injuries and directly attributable thereto.

Plaintiff says that on account of his said injuries he has been compelled to lose much time, and that he will never be able again, on account of said injuries, to follow, work at and pursue his usual occupation and business; and that his time is reasonable worth ten dollars per day.

That on account of serious personal bodily injuries done to him as aforesaid, the physical pain and suffering which he has endured and undergone in consequence thereof, and on account of the mental pain and anguish endured and suffered as a result of said injuries, and on account of his being permanently injured and disabled to work or to follow his usual occupation and business he has been damaged in the sum of twelve thousand dollars.

Plaintiff further sues herein for injuries done to his wife, Francis A. Duthie, at the same time and place and says that at the time said cars crashed together his wife was in the car left standing disconnected or the wild car; that she was thrown out of the seat where she was sitting and pitched headforemost out of said seat
35 over the back of another seat and onto the floor of the car and falling on and striking the floor with her head so that she was stunned and rendered unconscious, and had to be assisted out of said car.

That for several days thereafter she suffered severe pain and soreness in her head, neck and shoulders and was for several days confined to her bed as a result of said injuries. Plaintiff says that his wife has been permanently injured as a consequence of being violently thrown upon her head against the floor, in this, that before said accident she was at times subject to fainting spells or epilepsy, but that since her said injuries said fainting spells or epileptic fits

are of much more frequent occurrence than formerly and her suffering therefrom correspondingly increased, and that the frequent recurrence of such fainting spells or epileptic fits is the result of her said injuries and her being thrown upon her head upon the floor of said car.

That as a result of said injuries and the physical pain as well as mental suffering, pain and anguish suffered by her, and on account of the permanent injury to her health by causing the more frequent recurrence of said fainting spells or epileptic fits plaintiff is entitled to recover of defendant for the benefit of the community estate of himself and wife damages in the sum of five thousand dollars as actual damages for the physical pain and mental suffering and anguish suffered by her and for the permanent injury done to her health as aforesaid.

Plaintiff further says that each and all of the wrongs and injuries done to him as well as his wife were caused through the negligence and want of ordinary care and diligence upon the part of defendant and its servants and employés in this:

First. When said car or coach was left standing upon the track defendant and its servants and employés, when the remainder of the train was backed down to be coupled onto said car, if such was the purpose of backing down to said car, the same was negli-
36 gently and carelessly and without the exercise of ordinary care done, and by reason thereof said car and train failed to couple together, either by reason of the careless and negligent manner in which said coupling was attempted to be made or on account of defendant's and its servants' negligence and carelessness in not having the coupling apparatus on said cars properly prepared and adjusted so as to couple together when coming in contact or for both of said reasons said coupling was not effected but instead thereof said car was pushed and run off down the track.

Second. Plaintiff says that before said train backed down to said car for the purpose of coupling thereto defendant and its servants and employés in charge of said train negligently, carelessly and without the use of ordinary care and diligence failed to properly prepare and adjust the couplings to said cars so that when they came together the couplings would catch and hold, that if said couplings had been properly set, prepared and adjusted then said cars would have, if properly brought together, coupled and the accident averted.

Third. That defendant and its servants and employés when said car was left standing upon the track negligently, carelessly and without the exercise of ordinary care and diligence failed to provide and have said car equipped with proper and necessary appliances to prevent said car from moving and to set and leave set the brakes or apparatus for preventing said car from moving, that if said car had been properly provided and equipped with and said brakes or apparatus had been properly attended to, then, although when the other part of the train backed down and against said car and failed to effect a coupling, nevertheless said car could not and would not

have run off in the way it did, but would have moved only a short distance and stopped.

Fourth. That at the time said car started off down the track the servants and employés that were on said car, and plaintiff
37 says that there were servants and employés of defendant aboard of said car, through ignorance, unskillfulness, fright or some other unjustifiable cause were unable to control said car and to stop the same, and failed, for the reason either that they did not know how or the appliances for stopping said car were out of order, to stop said car, wherefore defendant is guilty of negligence and want of ordinary care and diligence in the selection of its servants and employés placed in charge of said car or who were upon the same when it ran off. And if in fact said servants and employés were skillful and no want of ordinary care or negligence can be imputed to defendant in their selection and employment, then defendant was nevertheless guilty of negligence and want of ordinary care and prudence in that the appliances with which said car was equipped and provided for stopping and holding same were inferior, insufficient and unsafe or in such defective condition as not to be available for the purpose for which they were intended, and that they were inferior, insufficient and unsafe and in such defective condition was known or by the use of ordinary care and diligence could have been known to defendant. And if said servants were skillful and efficient and the brakes and appliances for stopping said car were not inferior, insufficient, unsafe nor in a defective condition then defendant's servants were negligent and careless in failing to stop said car.

Fifth. Plaintiff says that when that part of the train backed down to couple to said car and failed to make such coupling and the servants and employés of defendant instead of then following said car with said part of said train and coupling onto and stopping said car negligently and carelessly and without exercising the ordinary care and diligence that the occasion demanded permitted said car to run off and get a considerable distance away before starting after it, when, if when the first attempt and failure to couple thereto
38 was made said part of the train with the locomotive attached had followed up said car the same by the use of proper and ordinary care and diligence could if the coupling appliances were of proper kind and in proper condition have been coupled onto and stopped or at least gotten under control in some way and the accident that resulted in the serious and great injuries done to plaintiff and his wife, as aforestated, been averted and avoided.

Sixth. That when said car was a considerable distance off and going at an increasing rate of speed defendant's servants and employés in charge of and operating the other part of the train started out to catch said car, or judging from the result of the race, to run said car down, and said servants and employés negligently and carelessly and without exercising ordinary care and diligence failed to watch and observe the speed of the runaway or wild car and so regulate the speed of the chasing train as to approach said wild car gradually and without doing damage thereto or to the passengers

upon said car and upon said chasing train, but negligently and carelessly rushed down upon said car at a great rate of speed and consequently crashed into same as hereinbefore set out, and thereby caused the injuries hereinbefore alleged.

Seventh. That defendant was guilty of culpable negligence and want of ordinary care in selecting and employing its servants and employés who were inefficient, incompetent and unskilled in the management and handling trains of cars and, in this instance, acted in a most inefficient, incompetent and unskilled manner, and the accident which resulted in the injuries which are herein complained of was the result of the inefficiency, incompetency and unskillfulness of said servants and employés handling and operating said train of cars. That such inefficiency and unskill-ness of said servants and employés is shown in the fact that said car was left on the track which was at that point on a steep incline without having the brakes so set as to prevent its running away, in the inability and failure to stop said car after it had been started, in the failure to have the couplings so prepared and adjusted as to effect a coupling when the first attempt to couple thereto was made and when they failed to couple, and in running the other part of the train down upon said car without so regulating the speed of the chasing part of the train as to approach said car and catch the same without crashing into it, and in divers other ways as shown by the allegations of negligence hereinbefore set out was the inefficiency, incompetency and unskillfulness of said servants and employés shown and that they were inefficient, incompetent and unskillful was well known to defendant or by the exercise of reasonable care and digilence could have been known to defendant.

39

Plaintiff says that defendant was negligent in the discharge of its obligations and duties as a common carrier to plaintiff and his wife as passengers upon its said passenger train under each and all of the foregoing seven counts charging negligence and that the said injuries to himself and wife were the result of such negligence and if upon trial hereof it be found that defendant is chargeable with negligence in either or all of said counts then plaintiff should recover against defendant actual damages in the sum of twelve thousand dollars for injuries by him sustained and for loss of time, and for the benefit of the community estate of himself and wife the sum of five thousand dollars actual damages on account of the injuries done to her.

Plaintiff says that the said injuries to himself and wife accrued through no fault or negligence upon the part of himself and wife or either of them, that contributed thereto, but were the result of the negligence and want of ordinary care and diligence upon the part of the defendant, its servants and employés.

That said injuries to plaintiff are of a permanent character, that is to say plaintiff's right leg, foot and ankle have been permanently injured, his left foot, ankle and leg permanently disabled and that as a result of his injuries he has become attacked and afflicted with rheumatism and thereby also permanently disabled, that he will continue, even if he secures temporary

40

relief, to be subject to attacks of rheumatism and rheumatic pains much to his annoyance, inconvenience and physical pain and suffering and mental anguish as well as menacing to his life.

That plaintiff has expended large sums in payment for physicians and medical attendance and for medicines for himself and wife since their said injuries and on account of said injuries, and will be compelled to expend further sums for medicines and physicians' services; that to obtain relief from the rheumatism resulting from the injuries received by him, he at a great expense has visited and tried the curative powers of the hot springs at Santa Rosalia, Mexico, but has received but little if any relief therefrom. Wherefore on account of said expenditures to say doctors' bills, medicines and expenses to said hot springs and return and the expenses incident thereto, such as extra costs of living at hotels and away from home, he has incurred an expense of one thousand dollars.

Plaintiff says that at the time of filing his original petition herein rheumatism had not, to his knowledge, then developed and attacked him, nor had he then incurred any expenses for physicians or medicines. Wherefore he prays now for one thousand dollars actual damages in addition to the damages claimed in said original petition and that upon hearing hereof he recover of defendant damages in the total sum of eighteen thousand dollars, and for costs of court and all such other relief general and special as plaintiff may in the premises be entitled to. As in duty bound will ever pray.

THURMOND & RUSSELL,
Attorneys for Plaintiff.

41 (Endorsed:) No. 297. J. M. Duthie *vs.* The Mexican Central Railway Company, Limited. Plaintiff's first amended original petition. Filed M'ch 19th, 1902. D. H. Hart, clerk. J. P. Hodgson, deputy. Thurmond & Russell, attorneys for plaintiff.

Verdict.

Filed April 10, 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY CO., L'T'D. } No. 297.

We the jury find for the plaintiff, and assess his damages at $8,500 (eighty-five hundred dollars) of which sum we find $7,500 seventy five hundred dollars, for injuries to himself, and $1,000 one thousand dollars for injuries to his wife, Frances A. Duthie.

T. J. CASSIDY, *Foreman.*

(Endorsed:) No. 297. J. M. Duthie *vs.* The Mex. Cent. R'y Co., Limited. Verdict. Filed Ap'l 10th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Judgment.

Entered April 10, 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., LIMITED. } No. 297.

This cause being called the 9th day of April, 1902, for trial, came the parties plaintiff in person and by his attorneys and defendant by its attorneys and respectively announced themselves ready for trial, whereupon came a jury of twelve good and lawful, duly qualified jurors, to wit, T. J. Cassidy and eleven others, who were
42 duly and legally tried, empaneled and sworn to try said cause and who after hearing the pleadings of the respective parties read and having heard the evidence adduced and on the 10th day of April, A. D. 1902, received the charge of the court, retired to consider of their verdict, and thereafter returned on the same day into open court their verdict, as follows:

"J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILROAD CO., L'T'D. } No. 297.

We the jury find for the plaintiff, and assess his damages at $8,500 (eighty-five hundred dollars) of which sum we find $7,500 (seventy-five hundred dollars) for injuries to himself, and $1,000 (one thousand dollars) for injuries to his wife, Frances A. Duthie.

T. J. CASSIDY, *Foreman.*"

Which said verdict was by the court approved and the jury discharged.

Wherefore, in accordance with the verdict of the jury, it is ordered, adjudged and decreed by the court that the plaintiff, J. M. Duthie, do have and recover of and from the defendant, The Mexican Central Railway Company, Limited, the sum of eight thousand five hundred dollars, as found by the jury, together with all costs in this cause incurred. For all of which let plaintiff have his execution. It is further ordered that the officers of this court have and recover of the respective parties herein the costs by them respectively incurred, for which execution may issue.

Order Extending Time to File Bills of Exception.

Entered April 14, 1902.

EL PASO, TEXAS, *April* 14, *A. D.* 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIMITED, } 297.

In this cause the Mexican Central Railway Company, Lim-
43 ited, is hereby granted thirty (30) days from and after this date in which to prepare and file its bill of exceptions herein.

Motion of Plaintiff for Leave to Amend Pleading.

Filed April 17, 1902.

In the Circuit Court of the United States of America for the Western District of the State of Texas, Sitting at El Paso, Texas.

J. M. DUTHIE
vs.
THE MEX'N CENT'L R'Y CO., LIM'D. } No. 297.

In this cause now comes the plaintiff, J. M. Duthie, and shows to this hon. court that in alleging the necessary jurisdictional facts in his original and first amended original petitions filed herein on the 29th day of August, 1901, and on the 19th day of March, 1902, respectively, plaintiff omitted and failed to allege that he, plaintiff, was a citizen of the State of Texas and of the United States of America, wherefore he now comes and prays the court that leave be granted him to now amend his said original and first amended petitions by inserting therein the following: "and is a citizen of said State and of the United States of America," after the allegation made in said pleading "that plaintiff resides in El Paso, in El Paso county, State of Texas." And in support of this motion plaintiff upon oath says that he is now and was at the date of filing his original petition herein and was on the 22d of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the State of Texas.

JOHN M. DUTHIE.

Subscribed and sworn to before me, this 17th day of April, 1902.

SEYMOUR THURMOND,
[SEAL.] *Notary Public, El Paso Co., Texas.*

44 (Endorsed:) No. 297. J. M. Duthie *vs.* The Mex'n Cent'l R'y Co., Lim'd. Motion of plaintiff for leave to amend pleading. Filed Ap'l 17th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Order Permitting Amendment of Pleadings.

Entered April 17, 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. } No. 297.

THURSDAY, *April* 17, 1902.

In this cause this 17th day of April, 1902, came on to be heard the motion of plaintiff praying leave to amend his original petition and first amended original petition filed herein August 29, 1901, and on the 19th day of March, 1902, respectively, so as to supply the allegation that plaintiff was at the date of institution of this suit a citizen of the State of Texas and of the United States of America.

And the court having heard said motion, and the argument of counsel for the respective parties, each of said parties being represented by counsel present in court, and fully considered the same, is of opinion that the prayer of the motion should be granted. Wherefore it is ordered by the court that plaintiff have leave to now amend his original petition filed herein on the 29th of August, 1901, and his first amended original petition filed herein on the 19th day of March, 1902, by inserting in said original petition and first amended original petition on the first page of said original and amended petitions, after the words and sentence "That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State," and before the sentence beginning "That defendant is a railway or railroad corporation," etc., an allega-
45 tion in the language and words following to say "and is a citizen of said State and of the United States of America." And thereupon the plaintiff in open court, on this 17th day of April, 1902, made and inserted in said original and first amended petitions the words, "and is a citizen of said State and of the United States of America." To which order of the court granting leave to plaintiff to make the amendment aforesaid, and to the making of such amendment by interlining same in the pleadings without rewriting the pleadings so amended, defendant through its counsel then and there in open court excepted.

Defendant's First, Second, and Third Bills of Exceptions.

Filed April 18, 1902.

In the United States Circuit Court in and for the Western District of Texas, Sitting at El Paso, Texas, April Term, A. D. 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., LIM. } No. 294.

Be it remembered, that upon the trial of the above styled and numbered cause in said court on the 9th and 10th days of April, 1902, this cause was tried on plaintiff's first amended original petition, as follows, to wit:

Suit Pending in the Honorable Circuit Court of the U. S. A. for the Western District of Texas, at El Paso, Texas, at its April Term, 1902.

J. M. GUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., LIM. } No. 297.

46 In this cause now comes the plaintiff and, with leave of the court first had, files this his first amended original petition in lieu of his original petition filed herein on the 29th day of August, 1901, and says:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State. That defendant is a railway or railroad corporation duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife, Francis A. Duthie, and their minor son.

That on the 22nd day of July, 1901, at El Paso, Texas, at a cost of about eleven dollars, plaintiff purchased of defendant through its agents, representatives or clerks, transportation for himself, his wife

and their child from El Paso to the city of Chihuahua, in the Republic of Mexico, and on said date boarded and took passage, with his wife and child, at El Paso upon one of defendant's passenger trains for Chihuahua in said Republic and which said train
47 was then in charge and control and under the management of defendant and its employés and servants. That on said July 22nd, 1901, at or near a station or place on defendant's line of railroad, in the said Republic of Mexico, called Moctezuma plaintiff and his wife were, through the negligence, want of ordinary care and diligence on the part of defendant and its servants and employés in charge of and managing said passenger train, greatly and seriously personally injured.

Plaintiff says that when said train arrived at said place or station for some reason unknown to plaintiff, the train of passenger cars upon which he, his wife and child were passengers, and which train consisted of several coaches, plaintiff is unable to say how many, or cars in which passengers usually travel and such other cars, locomotive, etc., as usually compose and make up a passenger train, was at said Moctezuma disconnected, that is to say one of the coaches or cars was disconnected or taken out of said train, but for what purpose plaintiff does not know, however said car or coach was for a short while left standing alone upon the track wholly disconnected from the balance of the train, shortly thereafter the remainder of said train, which had been pulled off some distance from said coach or car, was backed down to where said coach or car was left standing for the apparent purpose of coupling onto said coach or car, at any event that part of the train to which the locomotive was attached backed down to and against said car but instead of coupling onto said car ran against and pushed said car backward and started the same off down the track, which was down grade. Plaintiff says that if it was the object of defendant's servants and employés to run down to and couple that part of the train to which the locomotive was attached to said car that the same was negligently, carelessly and without the exercise of reasonable and ordinary care done, so that such coupling or attempt to couple failed and said car was pushed and started off down the track.

48 Plaintiff says that said car when run against and started off down the track continued to run on down said track and as it proceeded its speed rapidly increased and said car ran on down the track a considerable distance, a mile or more, that after said car had proceeded some distance down the track that part of the train to which the locomotive was attached was by the employés, agents and servants of defendant started down the track in pursuit of said car and for the apparent purpose of catching same and finally did catch and run and crash into said car.

That when said part of the train was backed down to said car for the apparent purpose of coupling thereto, plaintiff was on the coach or car in front of said part of said train, the same going backward at the time, and his wife and child were on said disconnected car, and plaintiff was still on said front car or part of the train to which the locomotive was attached when said part of said train was run

and crashed into said car upon which plaintiff's wife and child still were.

That when said part of said train to which the locomotive was attached started out to catch said car, which had theretofore been started off by itself, and was apparently at the time said part of the train to which the locomotive was attached started in pursuit, running wild, and appeared to be beyond control, said part of said train was started in pursuit at a high rate of speed which was increased as said part of said train continued the pursuit of said wild car; that finally said part of said train caught up with said car.

That plaintiff was then near the door or on the platform of the front car, that is to say, the car of the pursuing cars, which was in front backing down upon said wild car; that when said pursuing cars or train caught up with said wild car the pursuing train dashed and crashed into said wild car with tremendous force
49 and with force sufficient to wreck and demolish the ends of the cars coming in contact; that by reason of the force with which said cars came together and crashed into each other and the shock and sudden jar thereby caused, plaintiff was thrown or fell in between said cars and was greatly and seriously damaged and injured; that plaintiff's wife, who was in said wild and disconnected car, was by said force and shock thrown out of the seat in which she was sitting, over the seat in front and greatly and seriously bruised and injured.

Plaintiff says that he was caught between the cars and pinioned there; that in extricating himself, which he finally with great pain and suffering did, his shoes were pulled from his feet and left sticking between said cars where he had been pinioned and held by his legs and feet; that his legs and feet were caught and held in between said cars and badly and seriously mashed, bruised and injured; that he was also wounded, bruised and mashed in his arms, shoulders, back, head and spine, in fact was bruised, beat and mashed all over his body so that he suffered and continued for many days thereafter to suffer most exeruciating pain and soreness; that as a consequence of his injuries he, for more than a week thereafter, suffered great bodily pain and was unable on account thereof to sleep and rest; that he was for about twenty-five days, on account of his said injuries confined to his bed, that for more than a week he was unable to turn his body or move in bed without great inconvenience, annoyance, pain and physical suffering; that for more than thirty-five days after the accident he was unable to sustain any weight, or to stand erect upon either of his feet; that he is still unable to bear his weight upon his right foot and his left foot is still sore and tender and in a swollen condition and he is now compelled to use crutches to go about on foot; that his right foot and leg still continues and will continue to be in a crippled, sore and painful condition, and plaintiff, if he is ever able, will not for many months be able
50 to use his right leg and foot except with the aid of crutches; that said right leg, foot and ankle is now in crooked and deformed condition and his left leg is still sore, tender and swollen,

that the same was caused by the injuries received at the time of and in said accident, and plaintiff believes and charges that said injuries to his right leg, foot and ankle are and will remain permanent and that he will not ever again be able to use said right leg, nor can the same ever be restored to the same strength and usefulness as before it was injured as aforesaid. That for several days after plaintiff received the bruises and injuries as aforesaid, he suffered great physical pain and as a result of said injuries and the shock to his mind and general nervous system from said collision and accident was very sick and came near losing his life and was in much fear that he would die as a result of his said injuries and was thereby caused to suffer and did suffer in addition to the physical pain and torture and as a result thereof, great mental pain, fear and anguish; that ever since said injuries plaintiff has continually suffered more or less physical pain in his legs, arms and shoulders, and especially has he continued to suffer much pain in his right leg, foot and ankle which is still in a disabled, crippled and deformed condition and permanently injured; that he has continuously suffered from pain and soreness in his right arm which is and has been ever since receiving said injuries in a partially helpless condition, and plaintiff says that — has become afflicted with rheumatism in said right arm and in his shoulders, that he has been compelled to have the attendance, advice and ministration of physicians to attend upon him continuously, since his injuries, and that he is advised by his physicians and believes that he now has rheumatism in his said arm and shoulders, and plaintiff never within his knowledge has before been subject to or had an attack of rheumatism, that
51 he is forty-eight years of age and has prior to his said injuries been of stout, robust and perfect health, and he says the condition of his said arm and shoulders is the result of said injuries and directly attributable thereto.

Plaintiff says that on account of his said injuries he has been compelled to lose much time, and that he will never be able again, on account of said injuries, to follow, work at and pursue his usual occupation and business; and that his time is reasonably worth ten dollars per day.

That on account of serious personal bodily injuries done to him as aforesaid, the physical pain and suffering which he has endured and undergone in consequence thereof, and on account of the mental pain and anguish endured and suffered as a result of said injuries, and on account of his being permanently injured and disabled to work or to follow his usual occupation and business he has been damaged in the sum of twelve thousand dollars.

Plaintiff further sues herein for injuries done to his wife, Francis A. Duthie, at the same time and place and says that at the time said cars crashed together his wife was in the car left standing disconnected or the wild car; that she was thrown out of the seat where she was sitting and pitched headforemost out of said seat over the back of another seat and onto the floor of the car and falling on and striking the floor with her head so that she was stunned and rendered unconscious and had to be assisted out of said car.

That for several days thereafter she suffered severe pain and soreness in her head, neck and shoulders and was for several days confined to her bed as a result of said injuries. Plaintiff says that his wife has been permanently injured as a consequence of being violently thrown upon her head against the floor, in this, that before said accident she was at times subject to fainting spells or epilepsy,
but that since her said injuries said fainting spells or epileptic
52 fits are of much more frequent occurrence than formerly and
her suffering therefrom correspondingly increased, and that the frequent recurrence of such fainting spells or epileptic fits is the result of her said injuries and her being thrown upon her head upon the floor of said car.

That as a result of said injuries as the physical pain as well as mental suffering, pain and anguish suffered by her, and on account of the permanent injury to her health by causing the more frequent recurrence of said fainting spells or epileptic fits, plaintiff is entitled to recover of defendant for the benefit of the community estate of himself and wife damages in the sum of five thousand dollars as actual damages for the physical pain, and mental suffering and anguish, suffered by her and for the permanent injury done to her health as aforesaid.

Plaintiff further says that each and all of the wrongs and injuries done to him as well as his wife were caused through the negligence and want of ordinary care and diligence upon the part of defendant and its servants and employés in this:

First. When said car or coach was left standing upon the track defendant and its servants and employés, when the remainder of the train was — backing down to said car, the same was negligently and carelessly and without the exercise of ordinary care done, and by reason thereof said car and train failed to couple together, either by reason of the careless and negligent manner in which said coupling was attempted to be made or on account of defendant's and its servants' negligence, and carelessness in not having the coupling apparatus on said cars properly prepared and adjusted so as to couple together when coming in contact or for both of said reasons said coupling was not effected, but instead thereof said car was pushed and run off down the track.

Second. Plaintiff says that before said train backed down to said car for the purpose of coupling thereto defendant and its servants
and employés in charge of said train negligently, carelessly
53 and without the use of ordinary care and diligence failed to
properly prepare and adjust the couplings to said cars so that when they come together the couplings would catch and hold, that if said couplings had been properly set, prepared and adjusted then said cars would have, if properly brought together, coupled and the accident averted.

Third. That defendant and its servants and employés when said car was left standing upon the track negligently, carelessly and without the exercise of ordinary care and diligence failed to provide and have said car equipped with proper and necessary appliances to prevent said car from moving and to set and leave set the brakes

or apparatus for preventing said car from moving, that if said car had been properly provided, and equipped with and said brakes or apparatus had been properly attended to, then, although when the other part of the train backed down and against said car and failed to effect a coupling, nevertheless said car could not and would not run off in the way it did, but would have moved only a short distance and stopped.

Fourth. That at the time said car started off down the track the servants and employés that were on said car, and plaintiff says that there were servants and employés of defendant aboard of said car, through ignorance, unskillfulness, fright or some other unjustifiable cause were unable to control said car and to stop the same, and failed, for the reason either that they did not know how or the appliances for stopping said car were out of order, to stop said car, wherefore defendant is guilty of negligence and want of ordinary care and diligence in the selection of its servants and employés placed in charge of said car or who were upon the same when it ran off. And if in fact said servants and employés were skillful and no want of ordinary care or negligence can be imputed to defendant in their selection and employment, then defendant was nevertheless guilty of negligence and want of ordinary care
54 and prudence in that the appliances with which said car was equipped and provided for stopping and holding same were inferior, insufficient and unsafe, or in such defective condition as not to be available for the purpose for which they were intended, and that they were inferior, insufficient and unsafe and in such defective condition was known or by the use of ordinary care and diligence could have been known to defendant. And if said servants were skillful and efficient and the brakes and appliances for stopping said car were not inferior, insufficient, unsafe nor in a defective condition then defendant's servants were negligent and careless in failing to stop said car.

Fifth. Plaintiff says that when that part of the train backed down to couple to said car and failed to make such coupling and the servants and employés of defendant instead of then following said car with said part of said train and coupling onto and stopping said car negligently and carelessly and without exercising the ordinary care and diligence that the occasion demanded permitted said car to run off and get a considerable distance away before starting after it, when, if when the first attempt and failure to couple thereto was made said part of the said train with the locomotive attached had followed up said car the same by the use of proper and ordinary care and diligence could if the coupling appliances were of proper kind and in proper condition have been coupled onto and stopped or at least gotten under control in some way and the accident that resulted in the serious and great injuries done to plaintiff and his wife, as aforestated, been averted and avoided.

Sixth. That when said car was a considerable distance off and going at an increasing rate of speed defendant's servants and employés in charge of and operating the other part of the train started out to catch said car, or judging from the result of the race, to run

said car down, and said servants and employés negligently and carelessly and without exercising ordinary care and diligence
55 failed to watch and observe the speed of the runaway or wild car and so regulate the speed of the chasing train as to approach said wild car gradually and without doing damage thereto or to the passengers upon said car and upon said chasing train, but negligently and carelessly rushed down upon said car at a great rate of speed and consequently crashed into same as hereinbefore set out, and thereby caused the injuries hereinbefore alleged.

Seventh. That defendant was guilty of culpable negligence and want of ordinary care in selecting and employing its servants and employés who were inefficient, incompetent and unskilled in the management in and handling trains of cars and, in this instance, acted in a most inefficient, incompetent and unskilled manner, and the accident which resulted in the injuries which are herein complained of was the result of the inefficiency, incompetency and unskillfulness of said servants and employés handling and operating said train of cars. That such inefficiency and unskillfulness of said servants and employés is shown in the fact that said car was left on the track which was at that point on a steep incline, without having the brakes so set as to prevent its running away, in the inability and failure to stop said car after it had been started, in the failure to have the couplings so prepared and adjusted as to effect a coupling when the first attempt to couple thereto was made and when they failed to couple, and in running the other part of the train down upon said car without so regulating the speed of the chasing part of the train as to approach said car and catch the same without crashing into it, and in divers other ways as shown by the allegations of negligence hereinbefore set out was the inefficiency, incompetency and unskillfulness of said servants and employés shown and that they were inefficient, incompetent and unskillful was well known to defendant or by the exercise of reasonable care and diligence could have been known to defendant.

56 Plaintiff says that defendant was negligent in the discharge of its obligations and duties as a common carrier to plaintiff and his wife as passengers upon its said passenger train under each and all of the foregoing seven counts charging negligence and that the said injuries of himself and wife were the result of such negligence and if upon trial hereof it be found that defendant is chargeable with negligence in either or all of said counts then plaintiff should recover against defendant actual damages in the sum of twelve thousand dollars for injuries by him sustained and for loss of time, and for the benefit of the community estate of himself and wife the sum of five thousand dollars actual damages on account of the injuries done to her.

Plaintiff says that the said injuries to himself and wife accrued through no fault or negligence upon the part of himself and wife, or either of them, that contributed thereto, but were the result of the negligence and want of ordinary care and diligence upon the part of the defendant, its servants and employés.

That said injuries to plaintiff are of a permanent character, that

is to say plaintiff's right leg, foot and ankle have been permanently injured, his left foot, ankle and leg permanently disabled and that as a result of his injuries he has become attacked and afflicted with rheumatism and thereby also permanently disabled, that he will continue, even if he secures temporary relief, to be subject to attacks of rheumatism and rheumatic pains much to his annoyance, inconvenience and physical pain and suffering and mental anguish as well as menacing to his life.

That plaintiff has expended large sums in payment for physicians and medical attendance and for medicines for himself and wife since their said injuries and on account of said injuries, and will be compelled to expend further sums for medicine and
57 physicians' services; that to obtain relief from the rheumatism resulting from the injuries received by him, he, at a great expense, has visited and tried the curative powers of the hot springs at Santa Rosalia, Mexico, but has received but little if any relief therefrom. Wherefore on account of said expenditures to say doctors' bills, medicines and expenses to said hot springs and return and the expenses incident thereto, such as extra costs of living at hotels and away from home, he has incurred an expense of one thousand dollars.

Plaintiff says that at the time of filing his original petition herein rheumatism had not, to his knowledge, then developed and attacked him, nor had he then incurred any expenses for physicians or medicines. Wherefore he prays now for one thousand dollars actual damages in addition to the damages claimed in said original petition, and that upon hearing hereof he recover of defendant damages in the total sum of eighteen thousand dollars, and for costs of court and all such other relief general and special as plaintiff may in the premises be entitled to. As in duty bound will ever pray.

(Signed) THURMOND & RUSSELL,
Attorneys for Plaintiff.

That plaintiff's original petition as to all jurisdictional averments is as follows:

THE UNITED STATES OF AMERICA:

To the hon. circuit court for the western district of the State of Texas, at its October term, 1901, held at El Paso, Texas:

THE STATE OF TEXAS,
County of El Paso, Western District of the State of Texas.

To the Hon. T. S. Maxey, judge of said court:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company,
58 Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State. That defendant is a railway or

railroad corporation duly incorporated and chartered under the laws of and is a citizon of the State of Massachusetts, in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife Francis A. Duthie, and their minor son.

That this cause was tried on defendant's original answer, as follows to wit:

In U. S. Cir. Court, April Term, 1902.

J. M. DUTHIE
vs
MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

Now comes the defendant in the above styled and numbered cause, and excepting to plaintiff's petition filed herein says: That same is insufficient in law and fails to state cause of action, and of this the defendant prays judgment of the court.

And for further answer in this behalf defendant comes and says that it denies all and singular the allegations of plaintiff's said petition, and of this it puts itself upon the country.

59 That at said trial on said date defendant presented its general demurrer to plaintiff's said petition for action by the court, and the court then and there in open court overruled said general demurrer as shown by the following, to wit:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

In this cause this 9th day of April, came on to be heard the general demurrer and exception of defendant to plaintiff's amended petition and the same being heard by, and duly submitted to the court, it is hereby overruled, to which ruling of the court defendant duly excepted."

That after said demurrer was overruled each party announced ready for trial, and the pleadings being read, the evidence was offered in behalf of both parties. No evidence having been adduced by either party as to plaintiff's or defendant's residence, domicile, habitation or citizenship.

That upon the pleadings and proof in the cause the court instructed the jury to find a verdict for the plaintiff for such damages

as plaintiff had sustained; that the jury on the 10th day of April, 1902, returned into open court the following verdict, to wit:

"J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY CO., L'T'D. } No. 297.

We the jury find for the plaintiff and assess his damages at $8,500 (eighty-five hundred dollars), of which sum we find $7,500 seventy-five hundred dollars for injuries to himself, and $1,000 one thousand dollars for injuries to his wife, Frances A. Duthie.

T. J. CASSIDY, *Foreman.*"

60 That on said 10th day of April, 1902, judgment was entered upon said verdict, as follows:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

This cause being called this 9th day of April, 1902, for trial, came the parties, plaintiff in person and by his attorneys and defendant by its attorneys and respectively announced themselves ready for trial, whereupon came a jury of twelve good and lawful, duly qualified jurors, to wit: T. J. Cassidy and eleven others, who were duly and legally tried, impaneled and sworn to try said cause, and who after hearing the pleadings of the respective parties read, and having heard the evidence adduced, and on the following day, to say, this April 10th, 1902, received the charge of the court, retired to consider of their verdict and thereafter returned on the same day into open court their verdict, as follows:

'J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., L'T'D. } No. 297.

We the jury find for the plaintiff and assess his damages at $8,500 (eighty-five hundred dollars), of which sum we find $7,500 seventy-five hundred dollars for injuries to himself and $1,000 one thousand dollars for injuries to his wife Frances A. Duthie.

T. J. CASSIDY, *Foreman.*'

And which said verdict was by the court approved, and the jury discharged, wherefore, in accordance with the verdict of the jury, it is ordered, adjudged, and decreed by the court that the plaintiff J. M. Duthie do have and recover of and from the defendant
61 The Mexican Central Railway Company, Limited, the sum of eight thousand five hundred dollars as found by the jury, together with all costs in this case incurred, for all of which let plaintiff have his execution. It is further ordered that the officers of this court have and recover of the respective parties herein the cost by them respectively incurred."

That no further proceedings were had in said cause after the entry

of said judgment until, to wit: the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition, which motion is as follows:

"In the Circuit Court of the United States of America for the Western District of the State of Texas, Sitting at El Paso, Texas.

J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., LIM'T. } No. 297.

In this cause now comes the plaintiff J. M. Duthie and shows to this honorable court that in alleging the necessary jurisdictional facts in his original and first amended original petitions filed herein on the 29th day of August, 1901, and on the 19th day of March, 1902, respectively, plaintiff omitted and failed to allege that he, plaintiff, was a citizen of the State of Texas and of the United States of America. Wherefore he now comes and prays the court that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'and is a citizen of said State and of the United States of America,' after the allegation made in said pleading 'that plaintiff resides in El Paso, in El Paso county, State of Texas,' and in support of this motion plaintiff upon oath says that he is now and was at the date of filing his original petition herein and was on the 22nd day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States
62 of America and of the State of Texas.

JOHN M. DUTHIE.

Subscribed and sworn to before me this 17th day of April, 1902.
[SEAL.] SEYMOUR THURMOND,
Notary Public, El Paso Co., Texas."

That defendant objected to the granting of said motion on the ground that the court was without power to permit an amendment of the pleadings and alteration of the record without setting aside and holding for naught the verdict and judgment entered herein, but should dismiss said cause for want of jurisdiction.

That said motion coming on to be heard on said 17th day of April, 1902, the court in said cause made the following order, to wit:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., LIM. } No. 297.

In this cause this 17th day of April, 1902, came on to be heard the motion of plaintiff praying leave to amend his original petition and first-amended original petition filed herein, August 29th, 1901, and on the 19th day of March, 1902, respectively, so as to supply the allegation that plaintiff was at the date of institution of this suit a citizen of the State of Texas and of the United States of America, and the court having heard said motion and the argument of counsel by the respective parties, each of said parties being represented

by counsel present in court, and fully considered the same, is of opinion that the prayer of the motion should be granted; wherefore, it is ordered by the court that plaintiff have leave to
63 now amend his original petition filed herein on the 29th day of August, 1901, and his first amended original petition filed herein on the 19th day of March, 1902, by inserting in said original petition and amended original petition, on the first page of said original and amended petitions, after the words and sentence, 'That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State,' and before the sentence beginning, 'That defendant is a railway or railroad corporation,' etc., and allegations in the language and words following to say: 'And is a citizen of said State and of the United States of America,' and thereupon the plaintiff in open court on this 17th day of April, 1902, made and inserted in said original and first amended petitions the words: 'And is a citizen of said State and of the United States of America.' To which order of the court granting leave to plaintiff to make the amendment aforesaid and to the making of such amendment by interlining same in the pleadings without rewriting the pleadings so amended, defendant through its counsel then and there in open court excepted."

That to the action of the court in refusing to dismiss this cause and in allowing said order permitting said amendment to be made to said pleadings without first setting aside the verdict and judgment herein, defendant then and there in open court excepted, and the court permitted plaintiff without filing an amendment in said cause, and without setting aside the judgment heretofore rendered, to insert in his original petition and his amended petition hereinabove set out, in paragraph three thereof, the words: "And is a citizen of said State and of the United States of America," after that part of said paragraph reading as follows: "That plaintiff resides in El Paso, El Paso county, State of Texas, in the western district of said State," and defendant then and there objected to the action of the court in permitting the plaintiff to insert the said words
64 in his original and amended petition without requiring the plaintiff to rewrte and file a new amendment, which objection was overruled by the court, to which action of the court defendant then and there in open court excepted and now herewith tenders this its first, second and third bills of exceptions, asking that same be signed, sealed and approved by the court and made a part of the record herein, which is accordingly done, this the 18th day of April, 1902.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 297. J. M. Duthie *vs.* Mex. Central R'y Co., Lim Defendant's 1st, 2nd and 3rd bills of exceptions. Filed Ap'l 18th 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Order of Court as to Certificate of Jurisdiction.

Entered April 18, 1902.

In the Circuit Court of the United States, Western District of Texas, El Paso Division.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., L'T'D. } No. 297.

APRIL 18, 1902.

Be it remembered, that in the above styled and numbered cause, the court being in session for its April term, 1902, term at which the above styled and numbered cause was tried and judgment therein rendered, defendant presented, to be certified to the Supreme Court of the United States of America, certain questions and matters concerning and affecting the jurisdiction of this court, which questions and matters were duly certified, as per certificate of the court filed in this cause this day.

65 *Certificate of Jurisdictional Questions.*

Filed April 18, 1902.

IN THE UNITED STATES OF AMERICA, }
Western District of Texas. }

In the United States Circuit Court for the Western District of Texas, Sitting at El Paso, Texas, April Term, A. D. 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

I, T. S. Maxey, judge of said court, during this April term, 1902, of said court, said term being the same term at which the above styled and numbered cause was tried and at which judgment was therein rendered, this court now being still in session for said term, do hereby certify that on the 29th day of August, 1901, plaintiff brought this suit, on said date filing his original petition which is referred to hereafter in this certificate; that this cause was tried and judgment was rendered in this cause upon the plaintiff's first amended original petition filed herein March 19th, 1902, of which the following is a copy:

Suit Pending in the Honorable Circuit Court of the U. S. A. for the Western District of Texas, at El Paso, Texas, at its April Term, 1902.

J. M. DUTHIE
vs.
THE MEXICAN CENTRAL RAILWAY CO., LIM. } No. 297.

In this cause now comes the plaintiff and with leave of the
66 court first had, files this his first amended original petition in lieu of his original petition filed herein on the 29th day of August, 1901, and says:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Company, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State. That defendant is a railway or railroad corporation duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto, engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife, Francis A. Duthie, and their minor son.

That on the 22nd day of July, 1901, at El Paso, Texas, at a cost of about eleven dollars, plaintiff purchased of defendant through its agents, representatives or clerks, transportation for himself, his wife and their child from El Paso to the city of Chihuahua, in the Republic of Mexico, and on said date boarded and took passage, with his wife and child, at El Paso upon one of defendant's passenger trains for Chihuahua in said Republic and which said train was then in charge and control and under the management of defendant
and its employés and servants. That on said July 22nd,
67 1901, at or near a station or place on defendant's line of railroad, in the said Republic of Mexico, called Moctezuma, plaintiff and his wife were, through the negligence, want of ordinary care and diligence on the part of defendant and its servants and employés in charge of and managing said passenger train, greatly and seriously personally injured.

Plaintiff says that when said train arrived at said place or station for some reason unknown to plaintiff, the train of passenger cars upon which he, his wife and child were passengers, and which train consisted of several coaches, plaintiff is unable to say how many, or cars in which passengers usually travel, and such other cars, loco-

motive, etc., as usually compose and make up a passenger train, was at said Moctezuma disconnected, that is to say one of the coaches or cars was disconnected or taken out of said train, but for what purpose plaintiff does not know, however said car or coach was for a short while left standing alone upon the track wholly disconnected from the balance of the train, shortly thereafter the remainder of said train, which had been pulled off some distance from said coach or car, was backed down to where said coach or car was left standing for the apparent purpose of coupling onto said coach or car, at any event that part of the train to which the locomotive was attached backed down to and against said car, but instead of coupling onto said car ran against and pushed said car backward and started the same off down the track, which was down grade. Plaintiff says that if it was the object of defendant's servants and employés to run down to and couple that part of the train to which the locomotive was attached to said car that the same was negligently, carelessly and without the exercise of reasonable and ordinary care done, so that such coupling or attempt to couple failed and said car was pushed and started off down the track.

Plaintiff says that said car when run against and started off down the track continued to run on down said track and as it pro-
68 ceeded its speed rapidly increased and said car ran on down the track a considerable distance, a mile or more, that after said car had proceeded some distance down the track that part of the train to which the locomotive was attached was by the employés, agents and servants of defendant started down the track in pursuit of said car and for the apparent purpose of catching same and finally did catch and run and crash into said car.

That when said part of the train was backed down to said car for the apparent purpose of coupling thereto, plaintiff was on the coach or car in front of said part of said train, the same going backward at the time, and his wife and child were on said disconnected car, and plaintiff was still on said front car or part of the train to which the locomotive was attached when said part of said train was run and crashed into said car upon which plaintiff's wife and child still were.

That when said part of said train to which the locomotive was attached started out to catch said car, which had theretofore been started off by itself, and was apparently at the time said part of the train to which the locomotive was attached started in pursuit, running wild, and appeared to be beyond control, said part of said train was started in pursuit at a high rate of speed which was increased as said part of said train continued the pursuit of said wild car; that finally said part of said train caught up with said car.

That plaintiff was then near the door or on the platform of the front car, that is to say, the car of the pursuing cars, which was in front backing down upon said wild car; that when said pursuing cars or train caught up with said wild car the pursuing train dashed and crashed into said wild car with tremendous force and with force sufficient to wreck and demolish the ends of the cars coming in contact; that by reason of the force with which said cars

came together and crashed into each other and the shock and
69 sudden jar thereby caused, plaintiff was thrown or fell in
between said cars and was greatly and seriously damaged and injured; that plaintiff's wife, who was in said wild and disconnected car, was by said force and shock thrown out of the seat in which she was sitting, over the seat in front and greatly and seriously bruised and injured.

Plaintiff says that he was caught between the cars and pinioned there; that in extricating himself, which he finally with great pain and suffering did, his shoes were pulled from his feet and left sticking between said cars where he had been pinioned and held by his legs and feet; that his legs and feet were caught and held in between said cars and badly and seriously mashed, bruised and injured; that he was also wounded, bruised and mashed in his arms, shoulders, back, head and spine, in fact was bruised, beat and mashed all over his body so that he suffered and continued for many days thereafter to suffer most excruciating pain and soreness; that as a consequence of his injuries he, for more than a week thereafter, suffered great bodily pain and was unable on account thereof to sleep and rest; that he was for about twenty-five days, on account of his said injuries, confined to his bed, that for more than a week he was unable to turn his body or move in bed without great inconvenience, annoyance, pain and physical suffering; that for more than thirty-five days after the accident he was unable to sustain any weight, or to stand erect, upon either of his feet; that he is still unable to bear his weight upon his right foot and his left foot is still sore and tender and in a swollen condition and he is now compelled to use crutches to go about on foot; that his right foot and leg still continues and will continue to be in a crippled, sore and painful condition, and plaintiff, if he is ever able, will not for many months, be able to use his right leg and foot except with the aid of crutches; that said right leg, foot and ankle *is* now in crooked and deformed
condition and his left foot is still sore, tender and swollen,
70 that the same was caused by the injuries received at the time
of and in said accident, and plaintiff believes and charges that said injuries to his right leg, foot and ankle are and will remain permanent and that he will not ever again be able to use said right leg, nor can the same ever be restored to the same strength and usefulness as before it was injured as aforesaid. That for several days after plaintiff received the bruises and injuries as aforesaid, he suffered great physical pain and as a result of said injuries and the shock to his mind and general nervous system from said collision and accident was very sick and came near losing his life and was much in fear that he would die as a result of his said injuries and was thereby caused to suffer and did suffer in addition to the physical pain and torture and as a result thereof, great mental pain, fear and anguish; that ever since said injuries plaintiff has continually suffered more or less physical pain in his legs, arms and shoulders, and especially has he continued to suffer much pain in his right leg, foot and ankle which is still in a disabled, crippled and deformed condition and permanently injured; that he has con-

tinuously suffered from pain and soreness in his right arm which is and has been ever since receiving said injuries in a partially helpless condition, and plaintiff says that — has become afflicted with rheumatism in said right arm and in his shoulders, that he has been compelled to have the attendance, advice and ministration of physicians to attend upon him continuously since his injuries, and that he is advised by his physicians and believes that he now has rheumatism in his said arm and shoulders, and plaintiff never within his knowledge has before been subject to or had an attack of rheumatism, that he is forty-eight years of age and has prior to his said injuries been of stout, robust and perfect health, and he says the condition of his said arm and shoulders is the result of said injuries and directly attributable thereto.

71 Plaintiff says that on account of his said injuries he has been compelled to lose much time, and that he will never be able again, on account of said injuries, to follow, work at and pursue his usual occupation and business; and that his time is reasonable worth ten dollars per day.

That on account of serious personal bodily injuries done to him as aforesaid, the physical pain and suffering which he has endured and undergone in consequence thereof, and on account of the mental pain and anguish endured and suffered as a result of said injuries, and on account of his being permanently injured and disabled to work or to follow his usual occupation and business he has been damaged in the sum of twelve thousand dollars.

Plaintiff further sues herein for injuries done to his wife, Francis A. Duthie, at the same time and place and says that at the time said cars crashed together his wife was in the car left standing disconnected or the wild car; that she was thrown out of the seat where she was sitting and pitched headforemost out of said seat over the back of another seat and onto the floor of the car and falling on and striking the floor with her head so that she was stunned and rendered unconscious and had to be assisted out of said car.

That for several days thereafter she suffered severe pain and soreness in her head, neck and shoulders and was for several days confined to her bed as a result of said injuries. Plaintiff says that his wife has been permanently injured as a consequence of being violently thrown upon her head against the floor, in this, that before said accident she was at times subject to fainting spells or epilepsy, but that since her said injuries said fainting spells or epileptic fits are of much more frequent occurrence than formerly and her suffering therefrom correspondingly increased, and that the frequent recurrence of such fainting spells or epileptic fits is the result of her said injuries and her being thrown upon her head upon the floor of said car.

72 That as a result of said injuries *as* the physical pain as well as mental suffering, pain and anguish suffered by her, and on account of the permanent injury to her health by causing the more frequent recurrence of said fainting spells or epileptic fits, plaintiff is entitled to recover of defendant for the benefit of the community estate of himself and wife damages in the sum of five thou-

sand dollars as actual damages for the physical pain and mental suffering and anguish suffered by her and for the permanent injury done to her health as aforesaid.

Plaintiff further says that each and all of the wrongs and injuries done to him as well as his wife were caused through the negligence and want of ordinary care and diligence upon the part of defendant and its servants and employés, in this:

First. When said car or coach was left standing upon the track defendant and its servants and employés, when the remainder of the train was — backing down to said car, the same was negligently and carelessly and without the exercise of ordinary care done, and by reason thereof said car and train failed to couple together, either by reason of the careless and negligent manner in which said coupling was attempted to be made or on account of defendant's and its servants' negligence and carelessness in not having the coupling apparatus on said cars properly prepared and adjusted so as to couple together when coming in contact or for both of said reasons said coupling was not effected but instead thereof said car was pushed and run off down the track.

Second. Plaintiff says that before said train backed down to said car for the purpose of coupling thereto defendant and its servants and employés in charge of said train negligently, carelessly and without the use of ordinary care and diligence failed to properly prepare and adjust the couplings to said cars so that when they come together the couplings would catch and hold, that if said couplings had been properly set, prepared and adjusted then said cars would have, if properly brought together, coupled and the accident
73 averted.

Third. That defendant and its servants and employés when said car was left standing upon the track negligently, carelessly and without the exercise of ordinary care and diligence failed to provide and have said car equipped with proper and necessary appliances to prevent said car from moving and to set and leave set the brakes or apparatus for preventing said car from moving, that if said car had been properly provided, and equipped with and said brakes or apparatus had been properly attended to, then, although when the other part of the train backed down and against said car and failed to effect a coupling, nevertheless said car could not and would not run off in the way it did, but would have moved only a short distance and stopped.

Fourth. That at the time said car started off down the track the servants and employés that were on said car, and plaintiff says that there were servants and employés of defendant aboard of said car, through ignorance, unskillfulness, fright or some other unjustifiable cause, were unable to control said car and to stop the same, and failed, for the reason either that they did not know how or the appliances for stopping said car were out of order, to stop said car, wherefore defendant is guilty of negligence and want of ordinary care and diligence in the selection of its servants and employés placed in charge of said car or who were upon the same when it ran off. And if in fact said servants and employés were skillful and

no want of ordinary care or negligence can be imputed to defendant in their selection and employment, then defendant was nevertheless guilty of negligence and want of ordinary care and prudence in that the appliances with which said car was equipped and provided for stopping and holding same were inferior, insufficient and unsafe, or in such defective condition as not to be available for the purpose for which they were intended, and that they were inferior,
insufficient and unsafe and in such defective condition was
74 known or by the use of ordinary care and diligence could
have been known to defendant. And if said servants were skillful and efficient and the brakes and appliances for stopping said car were not inferior, insufficient, unsafe nor in a defective condition then defendant's servants were negligent and careless in failing to stop said car.

Fifth. Plaintiff says that when that part of the train backed down to couple to said car and failed to make such coupling and the servant sand employés of defendant instead of then following said car with said part of said train and coupling onto and stopping said car negligently and carelessly and without exercising the ordinary care and diligence that the occasion demanded permitted said car to run off and get a considerable distance away before starting after it, when, if when the first attempt and failure to couple thereto was made said part of the train with the locomotive attached had followed up said car the same by the use of proper and ordinary care and diligence could if the coupling appliances were of proper kind and in proper condition have been coupled onto and stopped or at least gotten under control in some way and the accident that resulted in the serious and great injuries done to plaintiff and his wife, as aforestated, been averted and avoided.

Sixth. That when said car was a considerable distance off and going at an increasing rate of speed defendant's servants and employés in charge of and operating the other part of the train started out to catch said car, or judging from the result of the race, to run said car down, and said servants and employés negligently and carelessly and without exercising ordinary care and diligence failed to watch and observe the speed of the runaway or wild car and so regulate the speed of the chasing train as to approach said wild car gradually and without doing damage thereto or to the passengers
upon said car and upon said chasing train, but negligently
75 and carelessly rushed down upon said car at a great rate of
speed and consequently crashed into same as hereinbefore set out, and thereby caused the injuries hereinbefore alleged.

Seventh. That defendant was guilty of culpable negligence and want of ordinary care in selecting and employing its servants and employés who were inefficient, incompetent and unskilled in the management in and handling trains of cars and, in this instance, acted in a most inefficient, incompetent and unskilled manner, and the accident which resulted in the injuries which are herein complained of was the result of the inefficiency, incompetency and unskillfulness of said servants and employés handling and operating said train of cars. That such inefficiency and unskillfulness of said

servants and employés is shown in the fact that said car was left on the track which was at that point on a steep incline, without having the brakes so set as to prevent its running away, in the inability and failure to stop said car after it had been started, in the failure to have the couplings so prepared and adjusted as to effect a coupling when the first attempt to couple thereto was made and when they failed to couple, and in running the other part of the train down upon said car without so regulating the speed of the chasing part of the train as to approach said car and catch the same without crashing into it, and in divers other ways as shown by the allegations of negligence hereinbefore set out was the inefficiency, incompetency and unskillfulness of said servants and employés shown and that they were inefficient, incompetent and unskillful was well known to defendant or by the exercise of reasonable care and diligence could have been known to defendant.

Plaintiff says that defendant was negligent in the discharge of its obligations and duties as a common carrier to plaintiff and his wife as passengers upon its said passenger train under each and
76 all of the foregoing seven counts charging negligence and that the said injuries of himself and wife were the result of such negligence and if upon trial hereof it be found that defendant is chargeable with negligence in either or all of said counts then plaintiff should recover against defendant actual damages in the sum of twelve thousand dollars for injuries by him sustained and for loss of time, and for the benefit of the community estate of himself and wife the sum of five thousand dollars actual damages on account of the injuries done to her.

Plaintiff says that the said injuries to himself and wife accrued through no fault or negligence upon the part of himself and wife, or either of them, that contributed thereto, but were the result of the negligence and want of ordinary care and diligence upon the part of the defendant, its servants and employés.

That said injuries to plaintiff are of a permanent character, that is to say plaintiff's right leg, foot and ankle have been permanently injured, his left foot, ankle and leg permanently disabled and that as a result of his injuries he has become attacked and afflicted with rheumatism and thereby also permanently disabled, that he will continue, even if he secures temporary relief, to be subject to attacks of rheumatism and rheumatic pains much to his annoyance, inconvenience and physical pain and suffering and mental anguish as well as menacing to his life.

That plaintiff has expended large sums in payment for physicians and medical attendance and for medicines for himself and wife since their said injuries and on account of said injuries, and will be compelled to expend further sums for medicine and physicians' services; that to obtain relief from the rheumatism resulting from the injuries received by him, he, at a great expense, has visited and tried the curative powers of the hot springs at Santa Rosalia, Mexico, but has received but little if any relief therefrom. Wherefore on account of

said expenditures to say doctors' bills, medicines and expenses
77 to said hot springs and return and the expenses incident thereto, such as extra costs of living at hotels and away from home, he has incurred an expense of one thousand dollars.

Plaintiff says that at the time of filing his original petition herein rheumatism had not, to his knowledge, then developed and attacked him, nor had he then incurred any expenses for physicians or medicines. Wherefore he prays now for one thousand dollars actual damages in addition to the damages claimed in said original petition, and that upon hearing hereof he recover of defendant damages in the total sum of eighteen thousand dollars, and for costs of court and all such other relief general and special as plaintiff may in the premises be entitled to. As in duty bound will ever pray.

(Signed) THURMOND & RUSSELL,
Attorneys for Plaintiff.

That plaintiff's original petition as to all jurisdictional averments is as follows:

THE UNITED STATES OF AMERICA:

To the hon. circuit court for the western district of the State of Texas, at its October term, 1901, held at El Paso, Texas:

THE STATE OF TEXAS,
County of El Paso,
Western District of the State of Texas.

To the Hon. T. S. Maxey, judge of said court:

Your petitioner, J. M. Duthie, who is hereinafter styled plaintiff, complaining of The Mexican Central Railway Compaay, Limited, and which company is hereinafter styled defendant, respectfully represents:

That plaintiff resides in El Paso, in El Paso county, State
78 of Texas, in the western district of said State. That defendant is a railway or railroad corporation duly incorporated and chartered under the laws of and is a citizen of the State of Massachusetts, in said United States of America, and owns and operates a line of railroad from El Paso to the city of Mexico in the Republic of Mexico, and is now, was on the 22nd day of July, 1901, and for many years prior thereto engaged in and pursuing the business of hauling and carrying by rail, for hire, passengers and freight over its said line to and fro between the cities above named.

That defendant has and maintains in the city of El Paso an office or offices for the transaction of its general business as common carriers of passengers and freight and has and employs there its local agent, whose name is S. R. Comfort.

That plaintiff is a married man of family consisting of himself, his wife Francis A. Duthie, and their minor son.

That this cause was tried on defendant's original answer, as follows, to wit:

In the U. S. Cir. Court, April Term, 1902.

"J. M. DUTHIE
vs.
M. C. R'Y COMPANY, LIMITED. } No. 297.

Now comes the defendant in the above styled and numbered cause and excepting to plaintiff's petition filed herein says: that same is insufficient in law and fails to state cause of action, and of this the defendant prays judgment of the court.

And for further answer in this behalf defendant comes and says that it denies all and singular the allegations of plaintiff's said petition and of this it puts itself upon the country."

That said cause coming on to be heard defendant read its general demurrer to plaintiff's said petition, and presented the same
79 without argument requesting the court to rule upon same. The court then and there overruled said demurrer as shown by the following order:

"J. M. DUTHIE
vs.
THE MEX. CENTRAL R'Y CO., LIM. } No. 297.

In this cause this 9th day of April, came on to be heard the general demurrer and exception of defendant to plaintiff's amended petition and the same being heard by, and duly submitted to, the court, it is hereby overruled, to which ruling of the court defendant duly excepted."

That after said demurrer was overruled, each party announced ready for trial, and the pleadings being read, the evidence was offered in behalf of both parties. No evidence having been adduced by either party as to plaintiff's or defendant's residence, domicile, habitation or citizenship.

That upon the pleadings and proof in the cause the court instructed the jury to find a verdict for the plaintiff for such damages as plaintiff had sustained; that the jury on the 10th day of April, 1902, returned into open court the following verdict, to wit:

"J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY CO., L'T'D. } No. 297.

We the jury find for the plaintiff and assess his damages at $8,500 (eighty-five hundred dollars), of which sum we find $7,500 seventy-five hundred dollars for injuries to himself, and $1,000 one thousand dollars for injuries to his wife, Frances A. Duthie.

T. J. CASSIDY, *Foreman.*"

80 That on said 10th day of April, 1902, judgment was entered upon said verdict as follows:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

This cause being called this 9th day of April, 1902, for trial, came the parties, plaintiff in person and by his attorneys and defendant by its attorneys, and respectively announced themselves ready for trial, whereupon came a jury of twelve good and lawful, duly qualified jurors, to wit: T. J. Cassidy and eleven others, who were duly and legally tried, impaneled and sworn to try said cause, and who after hearing the pleadings of the respective parties read, and having heard the evidence adduced, and on the following day, to say, this April 10th, 1902, received the charge of the court, retired to consider of their verdict and thereafter returned on the same day into open court their verdict as follows:

'J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., L'T'D. } No. 297.

We the jury find for the plaintiff and assess his damages at $8,500 (eighty-five hundred dollars), of which sum we find $7,500 seventy-five hundred dollars for injuries to himself and $1,000 one thousand dollars for injuries to his wife Frances A. Duthie.

T. J. CASSIDY, *Foreman.*'

And which said verdict was by the court approved, and the jury discharged, wherefore, in accordance with the verdict of the jury, it is ordered, adjudged, and decreed by the court that the plaintiff J. M. Duthie do have and recover of and from the defendant
81 The Mexican Central Railway Company, Limited, the sum of eight thousand five hundred dollars as found by the jury, together with all costs in this case incurred, for all of which let plaintiff have his execution. It is further ordered that the officers of this court have and recover of the respective parties herein the cost by them respectively incurred."

That no further proceedings were had in said cause after the entry of said judgment until, to wit: the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition, which motion is as follows:

" In the Circuit Court of the United States of America for the Western District of the State of Texas, Sitting at El Paso, Texas.

J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., LIM'T. } No. 297.

In this cause now comes the plaintiff J. M. Duthie and shows to this honorable court that in alleging the necessary jurisdictional facts in his original and first amended original petitions filed herein on the 29th day of August, 1901, and on the 19th day of March, 1902,

respectively, plaintiff omitted and failed to allege that he, plaintiff, was a citizen of the State of Texas and of the United States of America. Wherefore he now comes and prays the court that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'and is a citizen of said State and of the United States of America,' after the allegation made in said pleading 'That plaintiff resides in El Paso, in El Paso county, State of Texas,' and in support of this motion plaintiff upon oath says
82 that he is now and was at the date of filing his original petition herein and was on the 22nd day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the State of Texas.

JOHN M. DUTHIE.

Subscribed and sworn to before me this 17th day of April, 1902.
[SEAL.] SEYMOUR THURMOND,
Notary Public, El Paso Co., Texas."

That said motion coming on to be heard on said 17th day of April, 1902, the court in said cause made the following order, to wit:

"J. M. DUTHIE
vs.
THE MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

In this cause this 17th day of April, 1902, came on to be heard the motion of plaintiff praying leave to amend his original petition and first amended original petition, filed herein, August 29th, 1901, and on the 19th day of March, 1902, respectively, so as to supply the allegation that plaintiff was at the date of institution of this suit a citizen of the State of Texas and of the United States of America, and the court having heard said motion, and the argument of counsel by the respective parties, each of said parties being represented by counsel present in court, and fully considered the same, is of opinion that the prayer of the motion should be granted. Wherefore it is ordered by the court that plaintiff have leave to now amend his original petition filed herein on the 29th day of August, 1901, and his first amended original petition filed herein on the 19th day of March, 1902, by inserting in said original petition and amended original petition, on the first page of said original
83 and amended petitions, after the words and sentence, 'That plaintiff resides in El Paso, in El Paso county, State of Texas, in the western district of said State,' and before the sentence beginning 'That defendant is a railway or railroad corporation,' etc., and allegations in the language and words following, to say: 'and is a citizen of said State and of the United States of America,' and thereupon the plaintiff in open court on this 17th day of April, 1902, made and inserted in said original and first amended petitions the words: 'and is a citizen of said State and of the United States of America.' To which order of the court granting leave to plaintiff to make the amendment aforesaid and to the making of such

amendment by interlining same in the pleadings without rewriting the pleading so amended defendant through its counsel then and there in open court excepted."

That to said order permitting said amendment defendant then and there in open court excepted, and the court permitted plaintiff, without filing an amendment in said cause, and without setting aside the judgment heretofore rendered, to insert in his original petition and his amended petition hereinabove set out, in paragraph three thereof, the words: "and is a citizen of said State and of the United States of America," after that part of said paragraph reading as follows: "That plaintiff resides in El Paso, El Paso county, State of Texas, in the western district of said State," and defendant excepted to the action of the court in permitting the plaintiff to insert the said words in his original and amended petition without requiring the plaintiff to file a new amendment, saving bills of exceptions upon both of said points.

At defendant's request, the questions arising upon the overruling of defendant's general demurrer, and upon defendant's exception to the action of the court in not dismissing this cause and in
84 permitting plaintiff to amend his complaint and pleadings and to insert jurisdictional averments therein, and as to whether or not this court has jurisdiction in this cause, and power to permit said amendment after verdict and final judgment has been entered upon said verdict, without setting aside said judgment and resubmitting the case, and whether or not the court has jurisdiction so as to render said judgment valid from the date of the amendment made as aforesaid is hereby certified. The jurisdiction of this court in the matters aforesaid being hereby certified to the United States Supreme Court pursuant to the authority of section 5 of the act of March 3rd, 1891, entitled: "An act to establish circuit courts of appeal, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States and for other purposes," that is to say:

First. Whether or not the court should have dismissed this cause for want of jurisdiction upon becoming aware that the record did not contain the necessary jurisdictional matters.

Second. Whether the judgment rendered in this cause is validated and made effective by reason of the amendment made by plaintiff as aforesaid.

Third. Whether the court had jurisdiction, after verdict and after judgment entered upon said verdict, to permit, without setting aside this judgment and verdict, the plaintiff to amend his petitions, both original and amended, by inserting the necessary jurisdictional averments therein.

See Maddox v. Thorn, 60 F. R. 217.
Tremain v. Hitchcock, 90 U. S. 97.

Fourth. Whether or not the court should have set aside the verdict and judgment rendered herein and dismissed this case for want of jurisdiction on its own motion.

Signed and certified o, this 18th day of April, A. D. 1902, during the present term of this court, the same being still in session for the term at which said cause was tried.

T. S. MAXEY, *Judge.*

85 (Endorsed:) No. 297. In U. S. circuit ct. J. M. Duthie *vs.* M. C. R'y Co., Lim. Certificate of jurisdictional questions arising in this cause. Filed Ap'l 18th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Defendant's Assignment of Errors.

Filed April 18, 1902.

In the United States Circuit Court in and for the Western District of Texas, Sitting at El Paso, Texas, April Term, A. D. 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL R'Y CO., LIM. } No. 297.

Now comes the defendant, The Mexican Central Railway Company, Limited, by its counsel, and says that in the record and proceedings of the above styled and numbered cause there is manifest error, to wit:

1st. The court erred in overruling defendant's demurrer to plaintiff's petition for the reason that the averments thereof were not sufficient to show that the court had jurisdiction therein.

2nd. That the court had no jurisdiction in this cause and should have dismissed the same upon its own motion.

3rd. That the court should not have permitted plaintiff to destroy or alter the record by interlining in the pleadings certain jurisdictional averments and the trial court had no jurisdiction to permit plaintiff to amend his original petition and first amended original petition, by inserting the necessary jurisdictional averments therein, without first setting aside the verdict and judgment herein, and granted a new trial.

4th. It being nowhere averred and proved by plaintiff
86 that he was a citizen of the United States of America or of the State of Texas, prior to the rendition of said judgment, the court was without jurisdiction herein and should have set aside said verdict and judgment for the reason that it had no jurisdiction at the time of its rendition.

Wherefore, the defendant, The Mexican Central Railway Company, Limited, prays that the judgment rendered against defendant by the United States circuit court for the western district of Texas, be reversed and that this cause be dismissed for want of jurisdiction.

FALVEY & DAVIS,
Attorneys for Defendant.

(Endorsed:) J. M. Duthie *vs.* Mexican Central R'y Co., Lim. Defendant's assignment of errors. Filed Ap'l 18th, 1902. D. H. Hart, clerk. By J. P. Hodgson, deputy.

Defendant's Petition for Writ of Error.

Filed April 28, 1902.

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY CO., LIM. } No. 297.

UNITED STATES OF AMERICA,
Western District of Texas.

To the honorable justices of the Supreme Court of the United States:

The petition of the Mexican Central Railway Company, Limited, shows that in the record and proceedings, and also in the rendition of a judgment of a plea in the circuit court of the United States
87 for the western district of Texas, in a certain cause therein pending between J. M. Duthie, plaintiff, and The Mexican Central Railway Company, Limited, defendant, number 297, filed in said court at the October term thereof, A. D. 1901, in which judgment was rendered against defendant on the 10th day of April, 1902, manifest error hath intervened to the great prejudice and damage of the defendant.

Wherefore, defendant prays for the allowance of a writ of error, and such other processes as may cause the same to be corrected by the Supreme Court of the United States to be held in the city of Washington, District of Columbia.

FALVEY & DAVIS,
Attorneys for Petitioner, Mexican Central Railway Company, Limited.

Granted this 30 day of April, A. D. 1902.

T. S. MAXEY, *Judge.*

(Endorsed:) No. 297. In the United States circuit court for the western district of Texas, at El Paso. J. M. Duthie *vs.* Mexican Central Railway Co., Lim. Defendant's petition for writ of error. Filed this 28th day of Ap'l, 1902. D. H. Hart, clerk. J. P. Hodgson, deputy.

88 *Writ of Error.*

J. M. DUTHIE
vs.
MEXICAN CENTRAL RAILWAY COMPANY, LIM. } No. 297.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea, which is in said circuit court before you

or some of you, between J. M. Duthie, plaintiff, and The Mexican Central Railway Company, Limited, defendant, manifest error hath happened to the great damage of said Mexican Central Railway Company, Limited, as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to be holden at Washington, District of Columbia, in not exceeding thirty days from the — day of ——, A. D. 1902, the next term of said court to be held on the second Monday in October next, in the Supreme Court of the United States, to be then and there held, and the record and proceedings being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 28th day of April in the year of our Lord, 1902.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso. }

D. H. HART, *Clerk*,
88½ By J. P. HODGSON, *D'y Clerk.*

Allowed 30 day of April, A. D., 1902.

T. S. MAXEY, *Judge.*

[Endorsed:] No. 297. In the United States circuit court, in and for the western district of Texas. J. M. Duthie *vs.* Mexican Central Railway Company, Limited. Writ of error. Filed this 28th day of Ap'l 1902. D. H. Hart, clerk, by J. P. Hodgson deputy.

89 *Citation in Error.*

THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to J. M. Duthie, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, District of Columbia, within thirty days from the date of the service hereof, pursuant to writ of error sued out and filed in the clerk's office of the circuit court of the United States for the western district of Texas, in the cause wherein Mexican Central Railway Company, Limited, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in this behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 28th day of April, in the year of our Lord, 1902.

Signed this 30 day of April, A. D., 1902.

T. S. MAXEY,
United States Judge.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, El Paso. }

Attest: D. H. HART, *Clerk*,
By J. P. HODGSON, *D'y.*

We hereby acknowledge service of the above and foregoing citation in error.

—— ——.

Received this writ on this the 8th day of May A. D. 1902 and executed on the 8th day of May A. D. 1902 by delivering a true copy of this writ in person at El Paso Texas in my district to S. N. Russell a member of the law firm Thurmond and Russell.

GEO. L. SIEBRECHT,
U. S. Marshal, W. D. of T.,
By H. R. HILLEBRAND, *Deputy.*

[Endorsed:] No. 297. Mexican Central Railway Company, Limited, plaintiff in error, *vs.* J. M. Duthie, defendant in error. Citation. Filed this 28th day of Ap'l 1902. D. H. Hart, clerk, by J. P. Hodgson deputy.

90 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the United States circuit court for the western district of Texas, do hereby certify that the foregoing 87 pages contain true and correct copies of all proceedings had in cause No. 297 on the docket of said court at El Paso, Texas, entitled J. M. Duthie *vs.* Mexican Central Railway Company, Limited, as the same appear of record and on file in this office. And I further certify that the original writ of error and the original citation in error are attached therewith, paged respectively 88 and 89.

Witness my hand and the seal of said circuit court at office in the city of El Paso, Texas, this 20th day of May, A. D. 1902.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin. }

D. H. HART, *Clerk.*

Endorsed on cover: File No. 18,545. W. Texas C. C. U. S. Term No. 336. Mexican Central Railway Company (Limited), plaintiff in error, *vs.* J. M. Duthie. Filed May 27", 1902.

No. 336.

Motion to advance

Office Supreme Court U.S.
FILED
NOV 4 1902
JAMES H. McKENNEY,
Clerk.

Filed Nov. 4, 1902.

NO. 336

IN THE

Supreme Court of the United States

October Term, 1902.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR.

VS.

J M. DUTHIE, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

Appeal from the Honorable Circuit Court for the Western District of Texas at El Paso, Texas. Tried before Hon. T. S. Maxey, Circuit Judge on the 9th day of April, 1902, at the April term, 1902, of said Circuit Court at El Paso, Texas.

In the above cause now comes J. M. Duthie, defendant in error

plaintiff below, and respectfully prays and moves this Honorable Supreme Court to advance said cause upon the docket of this Court for the reason that the only question involved in this appeal is the question of jurisdiction of the Court below. And in support of this motion defendant in error submits the following:

Brief statement of the facts:

On the 29th day of August, 1901, defendant in error filed in the Circuit Court for the Western District of Texas his original petition, wherein he alleged among other things. * * * * * * * * * * * "That plaintiff resided in El Paso, in El Paso County, State of Texas, in the Western District of said State, etc." See Record, Bill of Exceptions of plaintiff in error wherein plaintiff's Original petition is set forth in full.

Plaintiff sued for damages for personal injuries to himself and wife while passengers on a train of cars being run and operated over the line of railroad of the Mexican Central Railway Company, Limited, plaintiff in error, defendant below, between El Paso, Texas, and Chihuahua in the Republic of Mexico. On the 19th day of March, 1902, defendant in error, plaintiff below, filed in the trial Court his first amended original petition in lieu of his original petition, but therein made no additional or further allegation or statement of his residence or citizenship than such as were made in his original petition, but simply repeated, as to citizenship of himself and defendant, such allegations in that regard as he had made in his original petition. On the 9th day of April, 1902, defendant filed in said cause, through its attorneys, an answer which consisted:

1st. Of a general demurrer and 2nd General denial.

No special pleas nor special exceptions to the plaintiff's pleading were filed by defendant. On the 9th day of April, 1902, the case was called

for trial and both parties answered ready, defendant's counsel stating to the Court that there was a general exception to the petition which was, by the Court, without argument, overruled. The cause proceeded to trial before a jury whose verdict was returned into Court on the 9th day of April, 1902, in favor of the plaintiff and assessing the damages at $7,500 for injuries to plaintiff and $1,000 for injuries to plaintiff's wife. On the same day judgment was accordingly entered upon said verdict. No further action was had in said cause until the 17th day of April, 1902, when plaintiff, having discovered that the allegations of his original petition as well as his first amended original petition were defective in failing to allege diverse citizenship, that is to say, in failing to allege that he was at the time of institution of suit a citizen of the State of Texas, filed in said Court, the same being still in session, his motion and prayer for leave to amend his pleading so as to supply the necessary allegations of his citizenship in the State of Texas, which motion and prayer for leave to amend was supported by the affidavit of plaintiff setting forth that at the time of the institution of the suit he was a citizen of the State of Texas, etc. This motion coming on to be heard on the 17th day of April, 1902, all of the parties by their counsel being in Court, the same was duly presented and argued to the Court and thereupon the Court made its order giving leave to plaintiff to make the amendment prayed for, without rewriting the amended or original petition and without setting aside the verdict and judgment previously rendered. To this action of the Court in permitting the petition and amended petition to be amended in the regard above stated, defendant through its counsel excepted. And thereafter, on the 18th day of April, 1902, filed in said Court its Bill of Exceptions Nos. 1, 2 and 3 as follows:

"On the ground that the Court was without power to permit an

amendment of the pleadings and alteration of the record without setting aside and holding for naught the verdict and judgment entered herein, but should dismiss said cause for want of jurisdiction." See Record Bill of exceptions of plaintiff in error.

The above objection of plaintiff in error to the Courts permitting the amendment to be made being overruled and the Court having granted the leave to amend and directed the amendment to be made by inserting the necessary allegations to show diverse citizenship without rewriting the pleading, plaintiff in error made the further objection as follows: "And defendant then and there objected to the action of the Court in permitting the plaintiff to insert the said words (to say, "and is a citizen of said State and of the United States of America") in his original and amended petition without requiring plaintiff to rewrite and file a new amendment. See Record Bills of Exception of plaintiff in error.

On April 18th, 1902, plaintiff in error filed in said cause assignments of error as follows:

"1st. The Court erred in overruling defendant's demurrer to plaintiff's petition for the reason that the averments thereof were not sufficient to show that the Court had jurisdiction therein.

2nd. That the Court had no jurisdiction in this cause and should have dismissed the same upon its own motion.

"3rd. That the Court should not have permitted plaintiff to destroy or alter the record by interlining in the pleadings certain jurisdictional averments and the trial Court had no jurisdiction to permit plaintiff to amend his original petition and first amended original petition, by inserting the necessary jurisdictional averments therein, without first setting aside the verdict and judgment rendered herein, and granting a new trial.

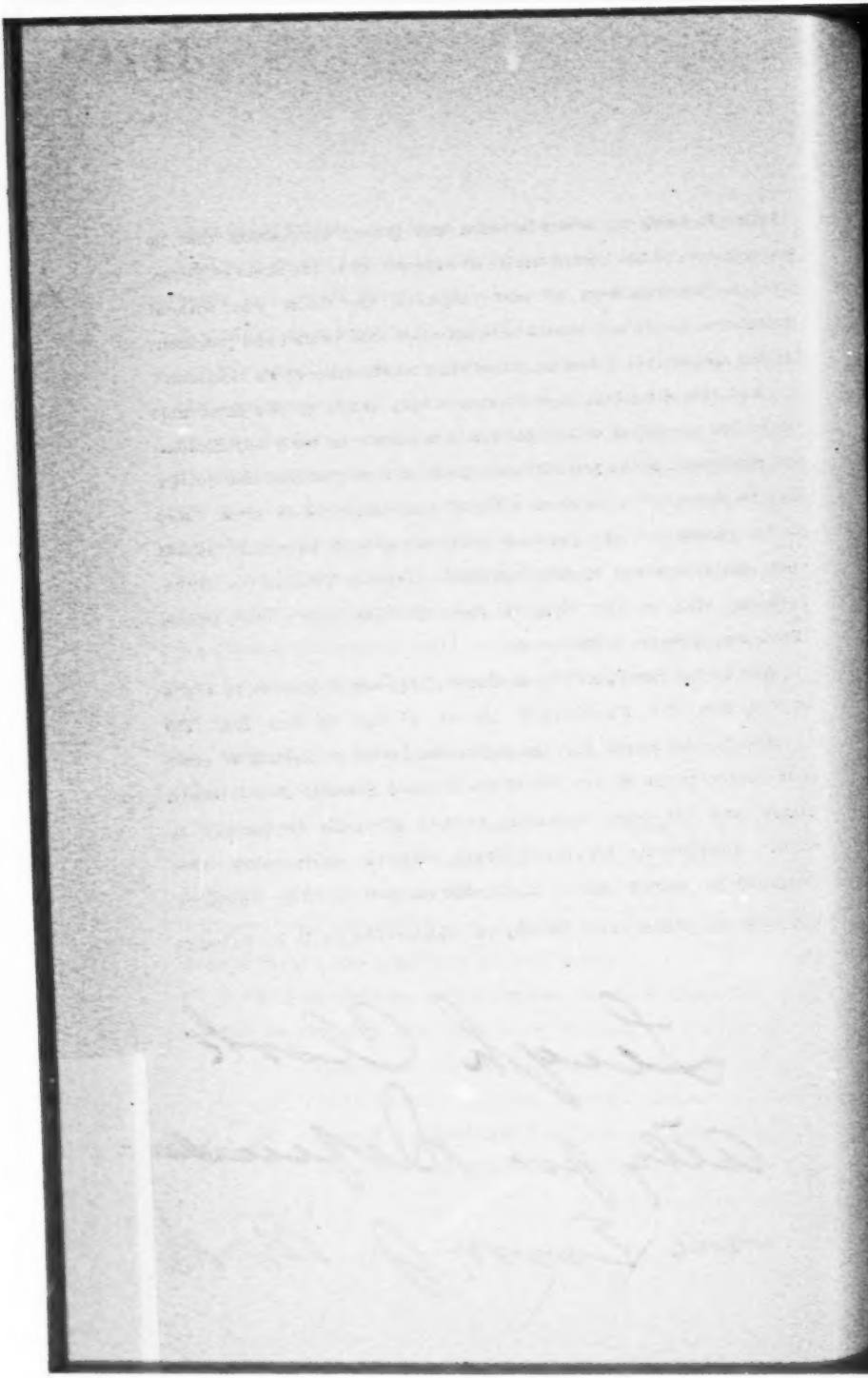
"4th. It being no where averred and proved by plaintiff that he was a citizen of the United States of America, or of the State of Texas, prior to the rendition of said judgment, the Court was without jurisdiction herein and should have set aside said verdict and judgment for the reason that it had no jurisdiction at the time of its rendition."

And this defendant in error respectfully shows to this Honorable Court that the object of this motion is to secure an early adjudication and settlement of the jurisdictional question involved. And that justice may be done herein between plaintiff and defendant in error. And for the reason that the question involved has been heretofore passed upon and determined by this Honorable Court in Tremain vs. Hitchcock, 23 Wall, p. 518; Neal vs. Neal, 76 U. S. 590; The United State vs. Bufford, 3 Peters 29.

And by the Honorable Circuit Court of Appeals in Maddox vs Thorn 60 Fed. Rep., 217; Fitchburg R Co. vs. Nichols, 85 Fed. Rep., 869

And for the reason that the contention herein of plaintiff in error is in contravention of Art. 954 of the Revised Statutes of the United States, and has been repeatedly decided adversely to plaintiff in error. Amendments are discretionary with the court below. See Chapman vs. Barney, 129 U. S. 677, and cases there cited; Chirac vs. Renicker, 11 Wheat, 280; Sheshy vs. Manderville, 10, U. S., 6 Cranch 253.

Leigh Clark
Atty. for Defendant
in Error J. M. Duche



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Office Supreme Court U.S.
FILED
JAN 6 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 336.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

v.

J. M. DUTHIE, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

EBEN RICHARDS,
General Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 5490

31710

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 336.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

v.

J. M. DUTHIE, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case is brought before this court on writ of error to the circuit court of the United States for the western district of Texas, issued under the provisions of the fifth section of the judiciary act of March 3, 1891, to determine the jurisdiction of said court therein. The record upon which the questions of jurisdiction arise is fully certified by the court below (Rec., 42–55).

The suit is brought by the plaintiff, Duthie, in his own right, for the recovery of damages for personal injuries sustained by him on the 22d day of July, 1901, while a passenger on one of the defendant company's trains at a station called Ojo Caliente on the line of the company's railway in the Republic of Mexico, and in behalf of the community

estate of himself and wife, for damages for personal injuries sustained by his wife, Frances A. Duthie, also a passenger on said train at said time and place. Plaintiff's original petition was filed August 29, 1901 (Rec., 1–13, 50), and citation against the defendant issued thereon (Rec., 13, 14). Defendant excepted to the citation on the ground that the date of filing plaintiff's petition was erroneously stated therein (Rec., 15), and by order of court said exception was sustained and service of citation quashed (Rec., 17). Defendant thereafter waived service and entered its appearance (Rec., 18). Afterwards and on March 19, 1902, plaintiff, by leave of court, filed his first amended original petition (Rec., 19–26, 43–50). Neither the original petition (Rec., 50), the original first amended petition (Rec., 43–50), nor any other part of the record contained any allegation of plaintiff's citizenship.

To such amended petition defendant filed a general demurrer and exception, and also answered, traversing all the allegations thereof (Rec., 18, 51). Defendant's general demurrer and exception was overruled, the defendant excepting thereto (Rec., 57), and, each party having announced themselves ready for trial, on April 9, 1902, the cause came on for trial before a jury (Rec., 51). No evidence was adduced by either party as to plaintiff's or defendant's residence, domicile, habitation, or citizenship (Rec., 38). On the following day, the jury having found a verdict assessing plaintiff's damages at $8,500, of which sum $7,500 was for injuries sustained by himself and $1,000 for injuries sustained by his wife (Rec., 26, 51), said verdict was by the court approved and judgment entered against the defendant in the sum of $8,500 (Rec., 27, 52). After entry of judgment no further proceedings were had in the cause until the 17th day of April following, when plaintiff filed a motion asking leave to amend his original and first amended original petition by inserting therein, after the allegations thereof as to plaintiff's residence, the words "and is a citizen of said

"State and of the United States of America," so as to read: "That plaintiff resides in El Paso, in El Paso county, "State of Texas, in the western district of said State, "*and is a citizen of said State and of the United States of America*" (Rec., 28, 52, 53); to the granting of which motion defendant objected on the ground that the court was without power to permit an amendment of the pleadings and alteration of the record without setting aside and holding for naught the verdict and judgment entered therein, but should dismiss said cause for want of jurisdiction (Rec., 40). On the day the motion was filed the court made an order granting leave to plaintiff to amend his petitions as prayed (Rec., 29, 53, 54); to which order defendant then and there in open court excepted, and on the following day filed its final bill of exceptions (Rec., 30–41).

The questions certified by the court below are as follows:

"*First.* Whether or not the court should have dismissed this cause for want of jurisdiction upon becoming aware that the record did not contain the necessary jurisdictional matters.

"*Second.* Whether the judgment rendered in this cause is validated and made effective by reason of the amendment made by plaintiff as aforesaid.

"*Third.* Whether the court had jurisdiction, after verdict and after judgment entered upon said verdict, to permit, without setting aside this judgment and verdict, the plaintiff to amend his petitions, both original and amended, by inserting the necessary jurisdictional averments therein.

"See *Maddox v. Thorn*, 60 F. R., 217.

"*Tremain v. Hitchcock*, 90 U. S., 97.

"*Fourth.* Whether or not the court should have set aside the verdict and judgment rendered herein and dismissed this case for want of jurisdiction on its own motion."

ASSIGNMENT OF ERRORS.

1st. The court erred in overruling defendant's demurrer to plaintiff's petition for the reason that the averments thereof were not sufficient to show that the court had jurisdiction therein.

2d. That the court had no jurisdiction in this cause and should have dismissed the same upon its own motion.

3d. That the court should not have permitted plaintiff to destroy or alter the record by interlining in the pleadings certain jurisdictional averments, and the trial court had no jurisdiction to permit plaintiff to amend his original petition and first amended original petition by inserting the necessary jurisdictional averments therein without first setting aside the verdict and judgment herein and granting a new trial.

4th. It being nowhere averred and proved by plaintiff that he was a citizen of the United States of America or of the State of Texas prior to the rendition of said judgment, the court was without jurisdiction herein and should have set aside said verdict and judgment for the reason that it had no jurisdiction at the time of its rendition.

Rec., 55.

ARGUMENT.

I.

The court erred in overruling defendant's demurrer to plaintiff's petition for the reason that the averments thereof were not sufficient to show that the court had jurisdiction therein.

Upon his original pleadings, on which this cause was tried, and which contained no averments of the essential jurisdictional fact of citizenship, it is, of course, manifest that plaintiff could not recover.

Robertson v. Cease, 97 U. S., 646, 649.
Timmons v. Elyton Land Co., 139 U. S., 378.

And even had the question of jurisdiction not been raised in the court below, or suggested on appeal, this court would *sua sponte* reverse the judgment of the circuit court, no averment of the citizenship of plaintiff appearing in the record.

Horne v. George H. Hammond Co., 155 U. S., 393.
Chapman v. Barney, 129 U. S., 677, 681.
Everhart v. Huntsville College, 120 U. S., 223, 224.
King Bridge Co. v. Otoe County, 120 U. S., 225, 226.

In no part of the record on which this case was tried, nor until the allowance of the amendment by the court, was there any averment whatever as to the citizenship of the plaintiff which could sustain the jurisdiction of the court under the rule laid down by this court in the case of *Muller v. Dows*, 94 U. S., 444.

The question of jurisdiction was properly raised by de-

fendant's demurrer by plea rather than in abatement to the jurisdiction.

North American Transportation, &c., Co. v. Morrison, 178 U. S., 262, 267.
Southern Pacific Co. v. Denton, 146 U. S., 203, 205.
Sullivan v. Fulton Steamboat Co., 6 Wheat., 450.
Laskey v. Newtown Mining Co.. 50 Fed. Rep., 634.
United States National Bank v. McNair, 56 Fed. Rep., 323, 324.
Fry v. Rousseau, 3 McLean, 106.
Rogers v. Linn, 2 McLean, 126.
Donaldson v. Hazen, 1 Hempst., 423.

In *Coal Company v. Blatchford*, 11 Wall., 172, this court said (p. 178):

> "A plea in abatement is required only where the "citizenship averred is such as to support the juris- "diction of the court and the defendant desires to "controvert the averment."

The defect in the petition being one of substance and not of form, a general demurrer was the proper way of raising the question. Indeed, it was the only proper mode. Plea to the jurisdiction implies an issue of fact. None such could be raised on plaintiff's petition, which disclosed in most patent manner that the cause was not within the jurisdiction of the circuit court, for as the petition then stood it is manifest no judgment could have been lawfully entered thereon.

It is manifest, therefore, that the court below erred in overruling defendant's demurrer and allowing the cause to proceed to trial upon the defective pleadings.

II.

After the verdict and judgment entered thereon, the trial court should not have allowed plaintiff to amend his pleadings by inserting the necessary jurisdictional averments therein without first setting aside the verdict and judgment and granting a new trial.

It is submitted that the action of the trial court in permitting the amendment of the pleadings in matter of substance, after verdict and judgment, and without setting verdict and judgment aside and awarding a *venire de novo*, thus in effect basing the judgment upon an issue not covered by the verdict and never presented to the jury, is in violation of fundamental principles of law and contrary to Federal practice. The defect was not such an one as would be validated by verdict, in which case no amendment would have been necessary, and the issue of plaintiff's citizenship never having been tried, no amendment of pleadings can read it into the verdict and judgment. True it is that this court has held that the statute of jeofails and amendments (Rev. Stats. U. S., sec. 954) extends to amendments after verdict, but such amendments are only authorized to cure some technical defect of verdict or judgment, as in the case of *Roach v. Hulings*, 16 Pet., 319, and *Shaw v. Railroad Co.*, 101 U. S., 657, and not to include under the verdict an issue never tried. No evidence as to plaintiff's citizenship was introduced at the trial (Rec., 38), nor could it have been under the pleadings. The pleadings upon which the case was tried and verdict found contain no allegations whatever as to the plaintiff's citizenship, and the amendment of those pleadings *after verdict* so as to show such citizenship cannot by relation back make the verdict cover a point not in issue. The verdict found upon pleadings which are substantially defective is itself defective, and judgment entered thereon is void. The well-known case of

Garland v. Davis, 4 How., 131, is here directly in point. That was an action on the case sounding in tort. The defendant pleaded *non assumpsit* instead of the proper plea of not guilty," the only contract alleged in the declaration being merely by way of inducement. Issue being joined, the case was tried and verdict found for plaintiff. The court held the plea of *non assumpsit* to be fatally defective, nor such an one as could be cured by verdict, Mr. Justice Woodbury delivering the opinion of the court, saying (p. 147):

> "The defect here, then, is in the verdict as well as "plea, and though a mere informality in the former "is cured by the act of Congress as to amendments (16 "Pet., 319), yet the defect here is similar in both, and "as just shown, being on principle in both a defect "in substance no less than form, is uncured (*Stearns 'v. Barrett*, 1 Mason, 170, and 2 Mason, 31).
>
> "But several arguments have been offered against "a reversal of the judgment and further proceedings, "and in favor of rendering judgment for the plaintiff, "on this record, though the plea, issue, and verdict "are all defective in substance, and do not show "which party is entitled to recover, on the real merits "in dispute, or that they have been legally tried.
>
> "These arguments it is our duty to examine. One "is that the whole merits, according to the evidence re- "ported, may have actually been considered and "passed upon in the court below under this plea and "issue. But it is a sufficient answer to this, that if so "done it was illegally done, no evidence being com- "petent under that issue except the promise described "in it, and no opinion of the jury or the court being "regular or proper under it except as to that promise "alone (*Harrison et al. v. Nixon*, 9 Pet., 483)
>
> "There are many cases showing that the evidence "must be limited to the plea (*Mar. Ins. Company v.*

"*Hodgson*, 6 Cranch, 206; 4 Wheat, 64, in case of "*The Divina Pastora*). The court say you must 'not "'admit the introduction of evidence varying from "'the facts alleged' (9 Pet., 484). The *probata* should "conform to the *allegata* (*Boone v. Chiles*, 10 Pet., 177).

"In *Barnes v. Williams*, 11 Wheat., 416, it is said: "'Upon inspecting the record, it has been discovered "'that the special verdict found in the case was too "'imperfect to enable the court to render judgment "'upon it.' A certain fact was important to the re- "covery. 'Although in the opinion of the court "'there was sufficient evidence in the special verdict "'from which the jury might have found the fact, "'yet they have not found it, and the court could not "'upon a special verdict intend it.'

"These illustrations and cases tend to show the "difficulties in forming an opinion on anything not "found or apparent on the record; and the impropriety "of conjecturing and pronouncing on the real merits, "when both the issue and verdict are defective in "substance in relation to them."

And the court reversed the judgment of the court below and remanded the cause for further proceedings.

So also in *Barnes v. Williams*, 11 Wheat., 415, where the special verdict was defective in matter of substance, this court, per Marshall, C. J., held that the trial court could not intend any substantive fact not found by the jury, although the record contained sufficient evidence to warrant the jury in finding it, and reversed the judgment, remanding the cause with direction to the trial court to award a *venire facias de novo*.

In the case of *Smith v. Jackson*, 1 Paine, 486 (*s. c.*, 22 Fed. Cases 13,065, p. 576) the points involved were identical with those here in issue. The district court, *after judgment entered*, allowed plaintiff to amend his declaration (1) to show that

plaintiff was a citizen of the State of New York, and (2) that the value of the property in controversy was over five hundred dollars. The case coming before the circuit court, inquiry was directed as to whether the trial court had power to allow such amendment (1) at common law, and (2) by statute. The opinion of the court by Mr. Justice Thompson, sitting on the circuit, gives such a learned discussion of the law of amendments that we quote it *in extenso*. He says (p. 488):

> "The exercise of the authority of courts to amend
> "at common law has in the history of the judicial
> "proceedings of the English courts undergone very
> "considerable changes, and courts grew much more lib-
> "eral on that subject, even before any provision was
> "made by statute. Anciently the amendment could
> "be made only in the term in which the judicial act
> "was done and recorded; as during this term the pro-
> "ceeding was deemed to be in the judges' breasts, and
> "not in the roll. Afterwards a more liberal practice
> "was introduced, and amendments were allowed at
> "any time pending the suit or proceedings, and whilst
> "they were considered *in fieri*, and until final judg-
> "ment was rendered and enrolled. But in no instance
> "will it be found, I believe, that the court made any
> "amendment whatever after the expiration of the
> "term in which final judgment was given. And as
> "to what amendments the courts would make at
> "common law, there seems to be much confusion and
> "uncertainty. As it was a matter in some measure
> "of discretion, liberal judges would allow amend-
> "ments that more scrupulous ones would not. The
> "amendments, however, made at common law were,
> "generally speaking, of trivial errors, and then only
> "where there was something to amend by. It is un-
> "necessary, however, to pursue this inquiry, for the
> "amendments made in this case were a year after

"final judgment, and so, clearly not within any com-
"mon-law powers of the court.

"2. The limited powers of the courts at common
"law, gave rise in England to the various statutes of
"amendments and jeofails. Those in England are, I
"believe, twelve or thirteen in number, passed at
"various periods, from the time of Edward the 3d to
"George 1st. These statutes thus passed by piece-
"meals, and in reference to the successive parts and
"steps, in the pleadings and proceedings in the cause,
"gave rise to almost innumerable cases on this sub-
"ject, which has occasioned no little confusion, if
"not some contradiction. With these, however,
"we have no concern, any further than they are
"decisions upon statutes analogous to our own.
"So far as any statutory provision goes, we must be
"governed by the act of Congress on this subject.
"The 32d section of the judiciary act (1 Stat., 91) de-
"clares, that no summons, writ, declaration, return,
"process, judgment, or other proceedings, in civil
"causes in any of the courts of the United States,
"shall be abated, arrested, quashed, or reversed for
"any defect or want of form; but judgment shall be
"given without regarding matters of form, except
"such as shall be specially demurred to. And au-
"thority is given to the courts to amend such imper-
"fections and wants of form, except such as shall
"be specially excepted to by demurrer; and they
"may at any time permit either of the parties
"to amend any defect in the process or pleadings,
"upon such conditions as the said courts respect-
"ively shall, in their discretion and by their
"rules, prescribe. That every part of this section,
"except the last clause, relates to such defects as are
"deemed matters of form cannot admit of a doubt.
"And this power over such defects of form, extends as

"well to the appellate court, as to the court where the "proceedings have been had; not that the amend- "ment is always actually made in the appellate court. "But the defect is not to be regarded as matter of "error. And the act declares that judgment shall be "given without regard to such imperfections or want "of form, and no conditions are to be imposed on "parties by reason of such formal defects. The last "clause in the act, however, may be extended further, "and embrace matters of substance; it authorizes the "court at any time, to amend any defect in the pro- "cess and pleadings, upon such conditions as the "court shall direct. *This power is confined to the pro- "cess and pleadings, and reaches all defects; it does not "extend to the judgment. When, therefore, an amend- "ment is made in substance, it must be whilst the pro- "ceedings are in fieri, and before judgment; and the "court then does it upon such terms as shall be deemed "just and equitable; and this is giving much greater "power over amendments than existed at common "law.* The court below might in this case, be- "fore final judgment, have permitted the amend- "ments upon terms as to costs, pleading anew, or "issuing a *venire de novo*, &c. Under the English "statutes of amendments and jeofails, neither the "aid of a verdict, nor an amendment can extend to "matters of substance, or whatever is essential to the "gist of the action, but only to defects in matters of "form. *All matters of substance must be stated in "the pleadings; and if stated, may occasion a different "verdict from that given when not stated. Hence, "whatever is thus essential, cannot be cured by ver- "dict, nor introduced by way of amendment; but by "the express intent of some* statute allowing the "amendment, or aiding the defect. It is a general "and essential rule of law, that all substantial facts

"be stated in proper time and place, so that the other "party may know what in substance he has to answer "to, and prepare accordingly. Every material matter "must be so clearly and directly stated, that the op- "posite party may put it in issue if he pleases. Much "nicety may be found in the books as to what is to be "deemed form and what substance. But as it respects "the present case, no doubt can exist but that the "amendments were in matters of substance. That it "was essential to aver, that the defendant was a citizen "of a State different from that of the plaintiff, has "been repeatedly decided by the Supreme Court of "the United States; and many judgments have been "reversed for this defect. *This was a fact that might "have been denied, and an issue joined thereon, and must "be tried by a jury. If there be no such averment, there "need be no such proof; and the verdict of the jury can "therefore afford no inference that there was any such "proof on the trial.*"

This court has uniformly held that, where the jurisdiction of the Federal court depends upon the citizenship of the parties, the presumption, in the absence of an affirmative showing of such citizenship by the record, is that the case is without the jurisdiction of the Federal court; that a mere averment of the residence of a party is insufficient to sustain the jurisdiction of the court; and that, the record being silent as to the citizenship of the parties, this court will reverse the judgment of the court below with directions to that court to grant a new trial upon proper amendment of the pleadings.

The case of *Robertson v. Cease*, 97 U. S., 464, in which this court on writ of error reversed the judgment of the circuit court of the United States for the western district of Texas, is, we submit, directly in point, and should have been held controlling by that court in the case at bar. That case was

an action upon a promissory note brought by Cease against Robertson, the plaintiff in error, in this court. There was no allegation as to the citizenship of Cease, the only averment as to him being that he "resides in the county of Mason and State of Illinois." Mr. Justice Harlan, delivering the opinion of the court, said (p. 648):

> "It is the settled doctrine of this court that, in cases "where the jurisdiction of the Federal courts depends "upon the citizenship of the parties, the facts essential "to support that jurisdiction, must appear somewhere "in the record. * * * Looking, then, at the plead- "ings, and to such portions of the transcript as prop- "erly constitute the record, we find nothing beyond "the naked averment of Cease's residence in Illinois, "which, according to the uniform course of decisions "in this court, is insufficient to show his citizenship "in that State. Citizenship and residence, as often "declared by this court, are not synonymous terms "(*Parker et al. v. Overman*, 18 How., 137).
>
> "In the oral argument before this court, the in- "quiry arose, whether since the adoption of the four- "teenth amendment to the Federal Constitution, the "mere allegation of residence in Illinois did not make "such a *prima facie* case of citizenship in that State as, "in the absence of proof, should be deemed sufficient "to sustain the jurisdiction of the circuit court. That "amendment declares that 'all persons born or natu- "'ralized in the United States, and subject to the juris- "'diction thereof, are citizens of the United States, "'and of the State where they reside.' It was sug- "gested that a resident of one of the States is *prima* "*facie* either a citizen of the United States or an "alien,—if a citizen of the United States, and also a "resident of one of the States, he is, by the terms of "the fourteenth amendment, also a citizen of the State

"wherein he resides,—and if an alien, he was en-
"titled in that capacity to sue in the Federal court,
"without regard to residence in any particular State.
"It is not to be denied that there is some force in
"these suggestions, but they do not convince us
"that it is either necessary or wise to modify the
"rules heretofore established by a long line of de-
"cisions upon the subject of the jurisdiction of
"the Federal courts. Those who think that the four-
"teenth amendment requires some modification of
"those rules, claim, not that the plaintiff's residence
"in a particular State necessarily or conclusively
"proves him to be a citizen of that State, within the
"meaning of the Constitution, but only that a gen-
"eral allegation of residence, without indicating the
"character of such residence, whether temporary or
"permanent, made a *prima facie* case of right to sue
"in the Federal courts. As the jurisdiction of the
"circuit court is limited in the sense that it has none
"except that conferred by the Constitution and
"laws of the United States, the presumption now,
"as well as before the adoption of the fourteenth
"amendment, is, that a cause is without its jurisdic-
"tion unless the contrary affirmatively appears. In
"cases where jurisdiction depends upon the citizen-
"ship of the parties, such citizenship, or the facts
"which in legal intendment constitute it, should be
"distinctly and positively averred in the pleadings,
"or they should appear affirmatively, and with equal
"distinctness, in other parts of the record. And so
"where jurisdiction depends upon the alienage of one
"of the parties. In *Brown v. Keene* (8 Pet., 115), Mr.
"Chief Justice Marshall said: 'The decisions of this
"'court require that the averment of jurisdiction
"'shall be positive, that the declaration shall state
"'expressly the fact on which jurisdiction depends.

"'It is not sufficient that jurisdiction may be in-
"'ferred argumentatively from its averments.'
"Here the only fact averred, or appearing from
"the record, is that Cease was a resident of Illinois;
"and we are, in effect, asked, in support of the juris-
"diction of the court below, to infer argumentatively,
"from the mere allegation of 'residence,' that, if not
"an alien, he had a fixed permanent domicile in that
"State, and was a native or naturalized citizen of the
"United States, and subject to the jurisdiction thereof.
"By such argumentative inferences, it is contended
"that we should ascertain the fact, vital to the juris-
"diction of the court, of his citizenship in some State
"other than that in which the suit was brought. We
"perceive nothing in either the language or policy of
"the fourteenth amendment which requires or justi-
"fies us in holding that the bare averment of the
"residence of the parties is sufficient, *prima facie*, to
"show jurisdiction. The judgment must, therefore,
"be reversed, upon the ground that it does not affirma-
"tively appear from the record that the defendant in
"error was entitled to sue in the circuit court.

* * * * * * *

"The judgment of the circuit court must, therefore
"be reversed, with directions to grant a new trial."

Halsted v. Buster, 119 U. S., 341, was an action to try title to real estate. The jury found a verdict for plaintiff and judgment was entered thereon. Defendant sued out a writ of error and the case came before this court. No averment of defendant's citizenship appeared on the record. Mr. Chief Justice Waite, speaking for the court, said (p. 342):

"For this reason the judgment is reversed, *but, as*
"*the fault rests alone on the plaintiff, whose duty it was*
"*in bringing the suit to make the jurisdiction appear, the*
"*reversal will be at his cost in this court.* (*Hancock v.*
"*Holbrook*, 112 U. S., 229.")

Chapman v. Barney, 129 U. S., 677, was an action of *assumpsit*. After trial had and verdict rendered in plaintiff's favor, the case came before this court on writ of error sued out by defendant. It appearing from the record that there was no satisfactory showing as to the citizenship of plaintiff, the court said (p. 682):

> "For these reasons we are of opinion that the rec-
> "ord does not show a case of which the circuit court
> "could take jurisdiction. The judgment of that court
> "must, therefore, be reversed at the costs, in this
> "court, of the defendant in error (*Hancock v. Hol-*
> "*brook*, 112 U. S., 229; *Halsted v. Buster, supra; Men-*
> "*ard v. Goggan, supra*). The judgment is reversed and
> "the cause remanded, with directions to set aside the
> "judgment, and for such further proceedings as may
> "not be inconsistent with this opinion."

The case of *Denny v. Pironi*, 141 U. S., 121, was an action brought in the circuit court for the northern district of Texas for the recovery of certain goods purchased of plaintiff. The only averment of the petition with respect to the citizenship of the parties was as follows:

> "That petitioners, who are hereafter styled plain-
> "tiffs, are and were at the times of the accrual
> "of the causes of action hereinafter stated, a mercan-
> "tile firm, composed as aforesaid, engaged in the
> "wholesale wine and liquor business in the city
> "and county of Los Angeles, California, where both
> "of said plaintiffs also reside; that defendant is a
> "resident citizen of Dallas county, Texas, within the
> "northern judicial district of Texas."

The case went to trial upon this allegation and the jury found a verdict in plaintiff's favor. Defendant moved in arrest of judgment, on the ground that there being no alle-

gation in the petition showing that plaintiff and defendant were citizens of different States, there was nothing to show the court had jurisdiction of the case. Thereupon plaintiffs filed a *remittitur* as to a portion of the judgment, in which the citizenship of the parties was fully stated. On the filing of this document the court made an order denying the motion in arrest of judgment and directed that execution issue for the balance of the judgment. The case coming before this court on writ of error sued out by defendant, this court, by Mr. Justice Brown, said (p. 123):

> "That an averment of residence is not the equiva-
> "lent of an averment of citizenship, and is insufficient
> "to give the circuit court jurisdiction, has been settled
> "in a multitude of cases in this court: *Parker v. Over-*
> "*man*, 18 How., 137; *Robertson v. Cease*, 97 U. S., 646;
> "*Everhart v. Huntsville College*, 120 U. S., 223; *Menard*
> "*v. Goggan*, 121 U. S., 253; and in case of a defective
> "averment in this particular the judgment will be
> "reversed by this court upon its own motion, and the
> "case remanded (*Peper v. Fordyce*, 119 U. S., 469;
> "*Everhart v. Huntsville College*, 120 U. S., 223; *Menard*
> "*v. Goggan*, 121 U. S., 253). A case cannot be amended
> "here so as to show jurisdiction, but the court below,
> "in its discretion, may allow it to be done where the
> "suit was instituted in the circuit court (*Continental*
> "*Insurance Company v. Rhoads*, 119 U. S., 237; *Halsted*
> "*v. Buster*, 119 U. S., 341).
>
> "This judgment then depends for its validity
> "wholly upon the question whether the mere recital
> "of the citizenship of the parties in the remittitur is
> "such an incorporation of the same into the record as
> "obviates the objection to the original petition and
> "supports the judgment.
>
> * * * * * * *
>
> "In the case under consideration, the remittitur
> "formed no proper part of the judgment record, and

" the recital of citizenship formed no proper part of the " remittitur. Undoubtedly proceedings subsequent to " the judgment are admissible to show what action has " been taken upon such judgment, as for instance, that " it has been vacated, stayed, amended, modified or " paid, that execution has been issued upon it, or that " a part of it has been remitted, but such proceedings " cannot be introduced to validate a judgment void " for the want of jurisdiction. Not only is the remit- " titur in this case open to this objection, but it ap- " pears upon its face not to have been filed in good " faith, but for the sole purpose of introducing the " averment of citizenship; in other words this aver- " ment is the object, and the remittitur the incident. " Remittiturs are used where the judgment has been " accidentally entered for a larger amount than was " due, or occasionally to forestall an appeal (*Pacific* " *Express Company v. Malin*, 132 U. S., 531), but never " to give jurisdiction where it is not otherwise shown. " *As well might it be contended that the difficulty could* " *be surmounted by filing an affidavit subsequent to judg-* " *ment. In either case it would be impossible for the* " *defendant to take issue upon it, or to submit it to the* " *court or jury as upon a plea in abatement.*

" *The judgment of the court below must be reversed, and* " *the case remanded for further proceedings not incon-* " *sistent with this opinion.*"

In *Cooper v. Newell*, 155 U. S., 532, an action to try title to real estate, the allegations of the petition with respect to the citizenship of the parties were as follows:

" The petition of Stewart Newell, a resident citizen " of the city of New York, in the State of New York, " hereinafter styled plaintiff, complaining of Eliza " Cooper, B. F. Cooper, and Fannie Westrope, *all resi-* " *dents of Galveston county, in the State of Texas*, and " hereinafter styled defendants."

There were no further allegations in the record respecting the citizenship of the parties. The jury found a verdict for plaintiff and judgment was entered thereon. Defendant sued out writ of error, assigning as one of the grounds for reversal the lack of jurisdiction of the circuit court, in that the citizenship of the defendants is not disclosed by the record.

Counsel for defendants in error argued that the averment of the petition as to the residence of defendants was *prima facie* evidence of citizenship. The chief justice, announcing the decision of the court, said (p. 534):

> "The judgment is reversed and the case remanded "to the circuit court for further proceedings, upon "the authority of *Horne v. George H. Hammond Com-"pany, ante*, 393, and cases cited."

See also:

Brown v. Keene, 8 Pet., 112.
Continental Insurance Co. v. Rhoads, 119 U. S., 237.
Menard v. Goggan, 121 U. S., 253.
Wolfe v. Hartford Life Ins. Co., 148 U. S., 386.
Horne v. George H. Hammond Co., 155 U. S., 393.
Bargh v. Page, 4 McLean, 10.

It will thus be seen that in all cases where the necessary jurisdictional averments have been lacking this court has reversed the judgment below, and has only allowed the amendment of the record below to embody such jurisdictional averments, *upon the setting aside of verdict and judgment, and the granting of a new trial.* As said by this court in *Denny v. Pironi, supra*, speaking of the effect of filing a *remittitur* therein: "As well might it be contended that the "difficulty could be overcome by filing an affidavit subse-"quent to judgment. *In either case it would be impossible "for the defendant to take issue upon it, or to submit it to the "court or jury as upon a plea in abatement.*"

The case of *The Tremolo Patent*, 23 Wall., 518, cited by the circuit court in its certificate, after the third jurisdictional question, under the style of *Tremaine v. Hitchcock*, 90 U. S., 97, is, we submit, not in point. In that case the court below allowed the amendment of the bill after final decree by inserting therein an averment of the second reissue of a patent, and Mr. Justice Strong, delivering the opinion of the court, said (p. 527):

> "We think that the order of the court directing that "the record be amended by inserting in the bill an "averment of the second reissue was properly made, "under the circumstances of the case, though made "after the final decree. *For practically the rights of the "complainants under the second reissue, and the defend-"ants' infringement thereof were in issue under the an-"swer and the replication.*"

It will thus be seen that the case cited bears no relation to the case at bar.

The averment inserted in the bill was of a matter which had been in issue in the cause, and, as admitted by counsel for the defendants and cross-appellants in his argument before this court (p. 526), "the bill was amended so as to let "in the proofs." In the case at bar, however, the citizenship of plaintiff was not in issue, nor was any evidence before the jury in that regard. Moreover, neither *The Tremolo Patent* case nor the case of *Maddox v. Thorn*, 60 Fed. Rep., 217, also cited by the court below, were jury cases, the former being an equity cause and the latter a case submitted to the court without a jury. In *Maddox v. Thorn* the court had announced its findings, but had not yet entered judgment. The case being tried before the court without a jury, defendants had the opportunity of contesting the issue raised by the amendment of the petition, had they so desired, all opportunity of doing which is denied to plaintiff in error here unless this court shall remand the case for a new trial.

Nevertheless it is submitted that the case of *Maddox v. Thorn* is contrary to the settled decisions of this court.

But independently of the established decisions of the Federal courts and the general principles of law on this question of amendments, there is a further and controlling reason why the court below should be reversed for error in allowing the amendment of plaintiff's petition after verdict. Such amendments are prohibited by the Texas statutes and are not allowed in the Texas courts, except after an arrest of judgment or new trial granted, when the judgment is set aside and the case proceeded with as if no trial had been had. By the practice conformity act of June 1, 1872, U. S. Rev. Stats., sec. 914, the specific provisions of the State statutes in this respect are controlling. As said by Mr. Justice Gray in *Glenn v. Sumner*, 132 U. S., 152, 156:

> "The sufficiency and scope of pleadings, *and the "form and effect of verdicts*, in actions at law, are mat- "ters in which the circuit courts of the United States "are governed by the practice of the courts of the "State in which they are held."

In *Henderson v. Louisville, &c., Railroad*, 123 U. S., 61, the question before the court being the amendment of the petition, this court, per Mr. Justice Gray, holding that the amendment could not be allowed, said (p. 64):

> "This action being upon the common-law side of "the circuit court, the pleadings and practice were "governed by the law of the State (Rev. Stats., "§ 914)."

He then cites and applies the provisions of the Louisiana Code of Practice.

In *Phillips, etc., Construction Co. v. Seymour*, 91 U. S., 646, the plaintiff, who had declared in covenant, was allowed to introduce evidence to prove that defendant had made a ver-

bal promise to pay the extra cost of certain construction work not included in the sealed agreement, and a special verdict covering such additional amount was found by the jury in plaintiff's favor. This court reversed the judgment with directions to set aside the special verdict, Mr. Justice Miller, *per curiam*, saying (p. 655):

> "The State of Illinois has adhered to the system of "pleading which recognizes the lines that separate the "forms of action at common law, and the act of Con- "gress requires the circuit court to conform to the "mode of pleading of the State in which the court sits. "Undoubtedly there was error under that system in "admitting proof of a parol contract of this kind in "an action of covenant; * * * In those States "where the distinctions between forms of action "have been abolished the declaration could have "been amended, and the two matters joined in the "same action. In that case we might, under the "statute of jeofails, disregard the error as one capa- "ble of removal by amendment below, and as cured "by verdict and judgment when it comes here.
>
> "But sec. 954 of the Revised Statutes, which was "section 32 of the judiciary act of 1789, was founded "on the English statute of 32 Henry VIII, and is no "broader. This act of Congress has been frequently "construed by this court in such a manner as to for- "bid its application to the case before us (*Garland v.* "*Davis*, 4 How., 131; *Stockton et al. v. Bishop, id.*, 155; "*Jackson v. Ashton*, 10 Pet., 480).
>
> "There is no room here for amendment. There "could have been none in the court below. To allow "a verdict to stand which is responsive to no issue "made by the pleadings, or which could have been "made by any pleadings in that action, is farther "than we can go in the promotion of abstract justice."

And so in *Atlantic & Pacific Railroad Co. v. Laird*, 164 U. S., 393, this court, in affirming the action of the trial court in allowing an amendment to the complaint during the trial, based its decision solely upon the California statutes and the decisions of the California courts.

In *Mack v. Porter*, 72 Fed. Rep., 236, the circuit court of appeals for the fourth circuit, in affirming the action of the court below in allowing certain amendments pending trial, said (p. 243):

> "In matters of this nature, the courts of the United "States are governed by the laws of the State where "the litigation is had."

See also—

People's, &c., Bank v. Batchelder Egg Case Co., 2 C. C. A., 126; 51 Fed. Rep., 130.

Post v. Wise Township, 101 Fed. Rep., 204.

Wolf v. Cook, 40 Fed. Rep., 432.

Amendments to pleadings under the Texas statute and practice are not allowable after verdict and judgment, except that after arrest of judgment or new trial granted the court may allow such amendment as if no trial had been had, or judgment reached. The act of March 9, 1889, amending the act of May 13, 1846 (Rev. Stats. Texas, art. 1188), provides that:

> "All amendments to pleadings, pleas and pleas of "intervention, must, when court is in session, be filed "under leave of the court, upon such terms as the "court may prescribe, before the parties announce "ready for trial, *and not thereafter*."

And section 34 of the act of May 13, 1846 (Rev. Stats. Texas, art. 1189), reads:

> "Such leave shall be given, and such amendment "filed, for a reasonable time before the case is called "for trial, so as not to operate a surprise to the oppo-"site party."

Section 114 of the act of May 13, 1846 (Rev. Stats. Texas, art. 1190), provides:

> "Whenever a judgment has been arrested or a new "trial granted, because of the insufficiency of the "pleadings of the party in whose favor the judgment "was rendered, the court may allow such pleadings "to be amended as if no such trial had been had or "judgment rendered."

In *Petty v. Lang*, 81 Tex., 238, plaintiffs during trial sought to amend their pleadings so as to allege a release of a levy of attachment in order to meet the allegations of defendant's plea in reconvention. The trial court allowed the amendment and plaintiffs were permitted to prove the release. The case coming up on defendant's appeal, the supreme court of Texas said (p. 241):

> "In view of the statute on the subject (Rev. Stats. "art. 1192) reading 'The pleadings may be amended "'under leave of the court upon such terms as the "'court may prescribe, before the parties announce "'ready for trial,' the permission to amend was an "error."

Heflin v. Burns, 70 Tex., 347, was an action of trespass to try title. Defendant plead the statute of limitations. At the trial plaintiff sought by amending her pleadings to set up the coverture of her grantor, in order to avoid the defendant's plea of limitations. This the trial court refused to allow. The case coming up on plaintiff's appeal, the supreme court said (p. 352):

> "This refusal was authorized and perhaps required "by the statutory rule (Rev. Stats., art. 1192). 'The "'pleadings may be amended under leave of the court "'upon such terms as the court may prescribe, before "'the parties announce themselves ready for trial, and "'*not thereafter*.'"

In *Missouri Pacific Railway Co. v. Howe*, 47 Tex. App. C., § 197, the facts are thus stated in the opinion:

> "Appellee recovered judgment against appellant for "$603.50 damages for destruction of his crops by fire "escaping from appellant's engines. On the trial, "when the evidence had been concluded and it had "been developed that a portion of the crops destroyed "belonged at the time of their destruction to the ten- "ants of appellee, the court, over the objection of ap- "pellant, permitted appellee to file a pleading alleg- "ing that, before the institution of the suit, he had "purchased from said tenants their claim for damages "to their said crops, etc. Under this pleading, and "the evidence, appellee recovered for the damages to "the crops of said tenants."

In reversing the court below for this error the court of civil appeals said:

> "To allow such a pleading was a violation of the "statute and of the rules of court governing plead- "ings and to tolerate such a violation would practi- "cally abolish our system of pleading. It would "permit a party to conform his allegations to his "proof after his evidence has been adduced, *when the "true rule is that his evidence must conform to his alle- "gations, and, unless it does, he cannot recover.*"

We know of no other case in which a trial court, after verdict found and the discharge of the jury, has, without the consent of the opposing party, allowed an amendment of pleadings, raising a new issue on a material point, on which no evidence whatsoever had been submitted to the jury, without first setting aside the verdict and granting a new trial. As shown above, the uniform practice of this court, in cases where the necessary jurisdictional averments were lacking

in the record, has been to reverse the judgment of the trial court and remand the case for a new trial upon the proper amendments setting forth the essential jurisdictional averments being made.

Where, after verdict, an amendment is made adding a substantial issue to the pleadings, there must of necessity be a new trial, for the new issue having never been passed upon by the jury, it can only be determined in that way.

The jury in this case brought in their verdict April 10 (Rec., 51), and on the same day judgment was entered thereon (Rec., 52). Not until the 17th of April, nearly a week thereafter, did plaintiff file his motion to amend (Rec., 52). The motion was taken up forthwith and granted unconditionally upon the *ex parte* showing of plaintiff's verified motion (Rec., 53). There is nothing in the record to show that defendant was given any opportunity of combatting this showing by filing counter-affidavits, and the precipitancy with which the proceedings were rushed through would seem to preclude any such possibility. Even had such opportunity been given, it would not have met the exigencies of the case. We are aware of no principle or theory of law under which issues of fact in an action at law can be divided up and determined piecemeal, part by the jury and part by the court; or by which a court, by allowing the alteration or substitution of pleadings, can make the jury's verdict cover issues never presented to them. The citizenship of the plaintiff is a substantive fact in the case. It is not such a fact as by fair intendment can be held to have been passed upon by the jury in arriving at their verdict, and the omission of which from the pleadings would be cured by the verdict. No evidence was adduced by either party as to plaintiff's residence, domicile, habitation, or citizenship (Rec., 51). By what authority, then, can the circuit court, by allowing an amendment to the petition without setting aside the verdict and judgment, make it appear that the verdict of the jury covers matters never in issue before them?

We submit, therefore, that the circuit court erred—

First. In overruling defendant's demurrer to plaintiff's petition, it not appearing from said petition or from the record in the case that the court had jurisdiction of the cause; and

Second. In allowing plaintiff to amend his petition by inserting therein the allegation of his citizenship without first setting aside the verdict and judgment and granting a new trial.

For which errors it is further respectfully submitted the judgment of the circuit court should be reversed at cost of defendant in error and the cause remanded to that court with directions to grant a new trial.

Respectfully submitted.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

EBEN RICHARDS,
General Counsel.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAR 23 1903
JAMES H. McKENNEY,
Clerk.

No. 336.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

J. M. DUTHIE, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The plaintiff's petition failed to aver necessary diverse citizenship. On such pleading the circuit court was without jurisdiction. *If* the averments had been sufficient in that regard, they could have been traversed only by plea in abatement. Such plea was not proper in the absence thereof. The defendant's answer to the petition as filed was that "it denies all and singular the allegations of plaintiff's "said petition, and of this it puts itself upon the country" (Rec., 51).

The issue thus made and tried did not cover the *fact* of plaintiff's citizenship, and the verdict necessarily did *not* cover that essential and primary fact.

The judgment could not be broader than the verdict. After rendition of judgment, it is submitted, no motion could cure the defect. The fact of diverse citizenship, then for the first time sought to be alleged by plaintiff, was one upon which the defendant was entitled to respond by proper plea, and upon issue joined thereon the ascertainment of the truth of the fact thus pleaded was matter for the jury alone. The jury having been dismissed, there was hence no way by which that fact could be determined except by setting aside the verdict and by a new trial and verdict upon properly amended pleadings. Diverse citizenship as a *fact* was not more within the competency of the court to determine in an action at law than any other issuable fact pertaining to the controversy between the parties. It is respectfully submitted that the guaranty of trial by jury under the Federal Constitution in all actions at law involving more than twenty dollars in value applies to each and every fact which is essential to the determination of the controversy, jurisdictional or otherwise. Alienage, minority, or other disability which would bar the right to sue or to recovery are all in the same category. The brief for defendant in error fails to grasp this primary and controlling principle, but the Federal cases cited upon our main brief enforce it with uniform accuracy and precision.

II.

Opposing counsel admits that the practice act of Texas clearly forbids the amendment here sought to be sustained after verdict and judgment. The Federal cases cited to show that the State practice act does not here control are, we submit, without application.

The question presented cannot, we respectfully submit, be determined upon any notions of abstract justice. Orderly procedure, the constitutional guaranty of jury trial upon all issuable facts, due observance of essential matters of substantial importance in the conduct of litigation, and maintenance of settled principles of judicature are too important to be thus set aside.

Respectfully submitted.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

EBEN RICHARDS,
General Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902

NO. 336

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR.

v.

J. M. DUTHIE, DEFENDANT IN ERROR.

CERTIFIED CASE

Error to the United States Circuit Court, Western District of Texas.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

We find no objection to make to appellant's statement of the nature and result of the suit, except that in making their statement of the action taken in the case, after rendition of judgment they should have said;

"after entry of judgment no further proceedings "were had in the cause until the 17th day of April

"following, when plaintiff filed a motion asking "leave to amend his original and first amended "original petitions by inserting therein, after the "allegations thereof as to plaintiff's residence, the "words 'and is a citizen of said State and of the "United States of America' so as to read: That "plaintiff resides in El Paso, in El Paso County, "State of Texas, and is a citizen of said State and "of the United States of America, which motion "was supported by the affidavit of the plaintiff "avering *under oath* that he was *at the time the "injuries were received, at the time the suit was "instituted and still is* a citizen of the State of "Texas and of the United States. This motion "came on to be heard on the day it was filed and "was duly submitted to the Court by both parties. "And thereupon after due consideration the "motion was sustained and the amendment al- "lowed.

In answer to the brief of learned Counsel for appellant, we shall devote our attention to what we deem the only issues in the case and the only matters of importance necessary to consider and those are, First: whether the trial Court had the right, or rather whether or not it was within the discretionary right of the Court to allow the amendment complained of after verdict and judgment had been rendered in the cause. Second: Whether the judgment rendered in this cause was

validated and made effective by reason of the amendment.

Proposition.

The trial Court may at any stage of the cause and at any time, while the case is within the control of the trial Court, in its discretion, permit amendments to be made to the pleadings, and, if the record discloses no abuse of the discretion of the trial Court in the premises, the Supreme Court will not interfere. U. S. R. S. Sec. 954.

For indeed in our opinion do the answers to these questions either affirm or reverse the judgment of the lower Court.

Argument of Appellee.

It is not pretended that plaintiff in error, defendant in the Court below, had at any time filed any plea in abatement, plea to the jurisdiction or special exception setting up the want of allegation of diverse citizenship, nor did the general demurrer, upon which there was no argument but simply the statement made to the Court that defendant plead the general demurrer and general denial, in any other than its general way call the Court's attention to the defect in the original and first amended petitions.

In Robertson v. Cease 97 U. S. 640, the first case cited by plaintiffs in error, no amendment, or motion to amend, was made in the trial court so as to supply the defective averment of or failure to aver citizenship.

The court in reversing this case, as it was compelled to do for want of sufficient allegations of citizenship, used this significant language with regard to the demurrer in that case, "such a course is peculiarly proper in this case (speaking of the course pursued by the court in Morgan v. Gay, 19 Wall 81) in view of the failure of plaintiff in error to make, in the court below, the precise question of jurisdiction which he urges upon our consideration. He filed, it is true, a plea to the jurisdiction of the circuit court; but did not impeach its jurisdiction upon the *distinct ground* that Cease did not appear to be a citizen of the State in which he resided. His denial of jurisdiction was upon the ground that the assignment to Cease was merely colorable, and for the fraudulent purpose of dispensing with letters of administration upon Chamblin's estate in Texas, thereby making a suit to be brought, in the court below, in the name of the assignee, but really for the use and benefit of that estate." In the above case the court went on further to say "After verdict, Robertson moved in arrest of judgment, upon the general ground that there was, "No cause of action stated in plaintiff's petition of which this court can take cognizance, and because it appears from the face of the pleadings that this court has no jurisdiction of the cause." But we can not feel sure, from this general language or from any thing in the record, that attention was called to the court below to the defect in the pleadings to which our attention has been specifically directed."

In the case at bar no motion in arrest of judgment was made in the court below by plaintiffs in error, nor does the record disclose that the attention of the court below was called to the particular defect of which plaintiff in error now complains, except through the general demurrer not argued nor even read to the court, and to which the only reference made was the statement of counsel to the court that "defendant pleads the general demurrer and general denial."

There is no question of nor do we dispute the soundness of the proposition that the Supreme Court would *sua sponte* reverse the judgment, if no action, such as was taken to remedy the defect in the pleading, had been taken, but no case is cited nor are we able to discover one in which the Supreme Court has held that the action of the lower court as shown by the record in this case has been erroneous.

In the second case cited by plaintiff in error "Timmons v. Elyton Land Co., 139 U. S. 378 no such question as is presented in this case was considered. In that case the record on appeal failed to show the necessary allegation of citizenship, and in said case no effort was made in the lower court to supply the allegation either before or after judgment.

Horne v. Hammond Co. 155 U. S., 393 and Chapman v. Barney 129 U. S. 677-81 cited third and fourth by plaintiff in error, reiterate the rule as stated in Timmons v. Elyton Land Co., that is, that the Supreme Court must take notice of the fact that the record fails

to disclose the citizenship of the parties. As to the matter of amendment, however, the Supreme Court in Chapman v. Barney *supra* in passing upon the discretionary power of the trial court to permit amendments, and this right of the trial court was questioned on the appeal, say, "We do not think the first assignment of error well taken. Amendments are discretionary with the court below, and not reviewable by this court."

Everhart v. Huntsville College 120 U. S. 223-4 and King Bridge Co. v. Otoe County 120 U. S. 225-26 go no further than to restate the rule that the Supreme Court must take notice of the omission from the record of the averment of citizenship. In none of these cases was any amendment attempted in the only court in which amendment could be allowed, viz. the trial court.

The record in the case at bar discloses the necessary facts to sustain the jurisdiction of the court.

"Trial court may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules prescribe." U. S. R. S. Sec. 954.

The court permitted the amendment to be made during the term at which the judgment was rendered. The court still had control of the case. The parties were in court. The proof of citizenship, plaintiff's affidavit in support of his motion asking leave to amend, was made.

No contest was made by defendant, no time asked in which to make such contest, no testimony offered by defendant upon the issue made by the motion and its supporting affidavit, no time asked within which to secure and introduce testimony. In fact defendant must have been satisfied, so far as this record shows that the motion and affidavit spoke the truth and could not be truthfully contested but relied solely on the technical ground that the matter of permitting the amendment had passed beyond the power and discretion of the trial court. Judgments are under the control of the Court where entered until the close of the term." Black on Judgments Vol. 1 Sec 153.

North American Transportation &c., Co. v. Morrison, 178 U. S. 262, 267 is, in our opinion, not in point. While it is true, that in that case, there was a defective, or absence of a necessary, allegation of citizenship for which the case would, in the absence of other objectionable features have been reversed, the reversal was in effect on account of misjoinder of causes of action rather than upon the other ground.

In Southern Pacific Co. v. Denton, 146 U. S. 203, 205. The proposition is laid down that "when the want of jurisdiction is apparent on the face of the petition, it

may be taken advantage of by demurrer, and no plea in abatement is necessary." See 4th paragraph of Syllabus. In the above case however, the plaintiff in error, defendant below, "did file a demurrer, for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer was over-ruled, and the defendant had excepted to the over-ruling thereof, that an answer to the merits was filed," and the court further in the opinion very correctly says: "Neither the special appearance for the purpose of objection to the jurisdiction, nor the answer to the merits after that objection had been over-ruled was a waiver of the objection."

In the case at bar no appearance was made for the *special* purpose of objecting to the jurisdiction, no demurrer was filed *specially* calling the attention of the court to the want of the jurisdictional averment.

In Sullivan v. Steamboat Co., 6 Wheat. 450 the suit was dismissed in the lower court for the want of sufficient or necessary averment of citizenship. From the judgment appeal was prosecuted and the judgment of the lower court affirmed. No attempt was made in the lower court to amend the pleading.

In Garland v. Davis 4 Howard 131, the judgment of the lower court was reversed for defect, appearing in the record on appeal, but not attempted to be remedied in

the trial court, if indeed such a defect, defect in the verdict as well as the pleading, could under the circumstances of that case have been then remedied, after the case had gone to trial upon the existing state of the pleadings of the respective parties, the defect being in the pleading and verdict. However the defects were not noticed in the Court below, much less any attempt made there to remedy such defects.

Says Mr. Justice Woodbury in delivering the opinion of the majority of the court

"In the examination of this case, a defect has been "discovered in the pleadings and verdict, which "was not noticed in the court below nor suggested "by counsel here." And further:

"So it is the duty of the court to give judg- "ment on the whole record and not merely on the "point stated by counsel (Slacum v. Pomeroy 6th "Cranch. 221; Baird & Co. v. Mattox I Call. 257, "16 Peters 319) Then further "I proceed to con- "sider the nature and character of the dificulty in "this cause, appearing in the record."

"The declaration is an action on the case "sounding in tort. It sets out no contract except "one by way of inducement, made by Mr. Frank- "lin, the predecessor in office of defendant, and "it then proceeds to make the gist of its complaint "a wrongful and injurious neglect and refusal by "the defendant to furnish a copy of certain laws "to the plaintiff, as had been agreed by Franklin.

"We are required to take this view of the decla-
"ration, not only by the averment in it, but both
"by the present and past positions of the counsel
"for plaintiff, that it was intended to be founded
"on a misfeasance. The plea, however, instead
"of being "not guilty," as was proper in such a
"case, is non assumpsit, and the plaintiff below,
"not demurring thereto, not moving for judgment
"notwithstanding such a plea, joined issue upon
"it, and the verdict conforms to the plea and issue
and merely finds, "that the defendant did not as-
"sume upon himself in manner and form &c., and
"assesses damages "sustained by reason of the
"non performance of the promise and assumption
"aforesaid."

Thus it will be seen that the verdict and judgment were reversed in Garland v. Davis, not, strictly speaking, upon defective pleading, but upon issues joined and trial had on the inconsistent, improper and bad plea of non assumpsit to a declaration in an action on the case sounding in tort. and we submit that counsel are mistaken in contending that the case is in point with the one now being considered.

Counsel for plaintiff in error insists that in Smith v. Jackson, 1 Paine, 482, 22 Fed. Cases, 13,065, 576. "the points involved were identical with these here in issue." We quote from their brief, p. 9. In this counsel drop into two very material errors.

First: The defective pleading in the case of Smith

v. Jackson was not attempted to be amended in the lower court while that court retained control of the case. Second: The pleading as contained in the record and transcript sent up to the appellate court went into and was filed in that court in its defective condition and an attempt was made in the appellate court to amend in that court, through a writ of certiorari to bring up an amendment made in the trial court after the appeal had been perfected, and, the transcript sent up and filed in the appellate court.

Circuit Judge Thompson in stating the case of Smith v. Jackson, says: "It is not pretended but that the record as it now stands is erroneous, and the judgment of the District Court must be reversed, unless the record is amended, and the object of setting aside the judgment on reversal is to *make way for a writ of certiorari, to bring up the amendments which have been made in the District Court.* The question then arises whether these amendments would be received here, and *attached to* the *record* which has *already been returned* into this court upon the writ of error; and I think these amendments ought not to be received here. They were made, according to my judgment, irregularly and without authority. *The judgment in the District Court was entered in January term, 1824. The record was filed and execution issued on the 3rd of March following. The writ of error was returned in the September term, 1824, of this court,* and in the January term, *1825,*" (one year after the judgment was entered) "the amendments were made,

etc." And in further expressing the opinion of the court in the case, Justice Thompson says: "Anciently the amendment could be made only in the term in which the judicial act was done and recorded; as during this term the proceeding was deemed to be in the judge's breast, and not in the roll. Afterwards a more liberal practice was introduced, and amendments were allowed at any time pending the suit or proceedings and while they were considered in *fieri*, and until final judgment was rendered and enrolled. But in no instance will it be found, I believe, that the court made any amendment whatever after the expiration of the term in which final judgment was given."

If defendant in error were before the court seeking to engraft on a record an amendment to a defective pleading, which amendment had been made after the adjournment of the term of the court at which the judgment was rendered, then, counsel might well say that Smith v. Jackson was a similar case, but in the case at bar the court was still in session and still had control of the case and the proceedings had, and at any time during the term, to be had therein.

In this connection we call the court's further attention to the language used by Judge Thompson in the opinion rendered in Smith v. Jackson, 1 Paine, 453, 22 Fed. Cases, No. 13,064, in refusing an application for writ of mandamus to the District Judge requiring him to vacate a rule which had been granted, allowing certain amendments of the record in the cause, and also to vacate

and annul said amendments, while the writ was refused, upon the ground "that this court has no authority to issue the mandamus applied for," Judge Thompson, in closing the opinion, says: "It may not be amiss barely to observe that the complaint in this case is for having improperly allowed certain amendments, which generally rest in the sound discretion of the court when the proceedings are pending and if this was a matter vested in the discretion of the District Court, it cannot be corrected or controlled either by a mandamus or writ of error."

We next consider Denny v. Pironi, 141 U. S., 121, quoted extensively by counsel for plaintiff in error on pages 17, 18 and 19 of their brief. In this case there was a defective averment of citizenship, in short, the averments were insufficient to give the trial court jurisdiction on the ground of diverse citizenship. Quoting from the opinion: "The case went to trial upon this allegation (an allegation of residence instead of citizenship) and a judgment was recovered against Denny and the sureties on his replevin bond for $2,224.70, the value of the property, besides $238.29 damages, with interest and costs. Motion was made for a new trial on February 23, 1891, * * * and was denied. Upon the same day motion was made in arrest of judgment, which had already been entered, upon the ground that there

was no allegation in the petition showing that plaintiff and defendants were citizens of different states, and no allegation to show that the court had jurisdiction."

The plaintiffs, Denny v. Pironi, supra, in whose favor judgment had been rendered, on the next day, we presume the day after the motion in arrest of judgment was filed, with the idea possibly that the defect in the pleading could be thereby, at least with the erroneous idea that thereby the record, in case of appeal, would contain a showing of diverse citizenship, filed a remittitur whereby they remitted from the $238.29 awarded them by the verdict as damages the sum of $5. In this remittitur set up that at the date of the institution of the suit, etc., he was a citizen of Texas, etc.

"Upon the filing of this *document*," (well says Justice Brown, by whom the opinion was rendered, in stating the case) "an order was made that, said remittitur be noted on the docket and filed herein as a part of the record of this cause and that the said sum of $5 be, and the same is hereby, remitted from the judgment of $238.29, assessed and adjudged as damages in said original judgment etc."

Indeed, it is most truly evident, as said in the opinion by Mr. Justice Brown that, "this remittitur (document) showed upon its face that it was not filed in good faith, but for the sole purpose of introducing, (getting into the record), the averment of citizenship; in other words this averment is the object and the remittitur the incident."

Counsel for plaintiff in error with seeming confidence in the strength of their position italicize the concluding words of the opinion, which are "As well might it be contended that the difficulty could be surmounted by filing an affidavit. In either case it would be impossible for defendant to take issue upon it, or submit to a court or jury, as upon a plea in abatement."

In the case above cited, Denny v. Pironi, no motion was made asking leave to amend, neither in writing nor verbally, no leave was asked or obtained in the case while it was still in the hands and within the control of the court to amend the declaration in the particular sought to be attained by filing the remittitur. *The Court may at any time* permit either of the parties to amend any defect in the process or pleadings U. S. R. S. Sec. 954, and "It is well settled that mere matters of proceedure such as the granting or refusing motions for new trial and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court and unless there has been gross abuse of that discretion they are not reviewable in this court on writ of error." Mexican Central Ry. Co. v. Pinkney 149 U. S. p. 201. "And, when such amendment is permitted the court must, in its discretion, determine whether any submission which had been made ought to be vacated." Bamberger v. Terry, 103 U. S., 13 Otto p. 40.

If Pironi & Slatri, defendants in error, in the case of Denney v. Pironi supra, had by a motion in writing

reciting the existence of the fact that at time of institution of the suit they were citizens of California and that defendant Denney, plaintiff in error, was a citizen of Texas. That by oversight or inadvertance such allegagations were in the first instance, omitted from the pleadings, and have satisfied the trial court that such was the case and have asked to amend and cure his petition in that regard, would it not have been within the discretion of the court to allow the amendment to have been made? If such motion had been made would it have been an abuse of the discretion with which the trial court is clothed by statute, in the absenee of any contest of the motion from the opposite party and the absence of any request for time or opportunity to contest, when, in fact, the opposite party is satisfied that the motion to amend speaks the truth, to grant the motion and permit the amendment? We submit that it would not.

That an averment of residence is not equivalent to an averment of citizenship and is insufficient to give the circuit court jurisdiction and that no amendment supplying the averment can be made in any other than the trial court, except by consent, appears to us to have been so often and repeatedly determined by the Supreme Court as well as the Circuit Court of Appeals, that, we deem a discussion of the proposition but a waste of time and tresspass upon the patience of the court. And while tendering every apology therefor, we plead in extenuation, the necessity forced upon us, by the brief of coun-

sel for plaintiff in error, of saying, that we believe no case has been cited by them in which any attempt was made within proper time and in the proper court to make the necessary amendment, that the action of the trial court, in permitting the amendment to be made, in the absence of any showing in the record of abuse of the discretion with which the trial court is in this particular clothed by statute and the oft repeated decisions of the Supreme Court and other appellate courts, has not been upheld.

Certain amendments will be permitted an any stage, of the case, so as to bring in an essential party or to aver citizensnip, Fisher v. Rutherford, Fed. Cases No. 4823; Hillard v. Brevoort, Fed. Cases No. 6505.

In view of the Statutes, Sec. 954 U. S. R. S. authorizing, in our opinion, the trial court to permit any amendment, which in such court's discretion works no injury to the adverse party and as reaches the end to be desired by all courts, substantial justice between the parties, we believe there can be no question of the disposition that should be made of this appeal. And if the appeal should not be dismissed, as we respectfully submit it should be, upon the grounds First: That it is an appeal from the action and ruling of the trial court in permitting an amendment to the pleadings and is not reviewable by the Supreme Court.

In the case of Mexican Central R. Co. v. Pinkney, 149 U. S. p. 201, Mr. Justice Jackson in delivering the opinion of the court, says:

"It is well settled that mere matters of proceedure, such as the granting or refusing motions for new trails, and questions *respecting amendments to the pleadings*, are purely discretionary matters for the consideration of the trial court, and, unless there has been *gross abuse* of that discreation, they are not reviewable in this court on writ of error."

See also Chapman v. Barney, 129 U. S , 677.

Second: That error will not lie to the Supreme Court on allowance or refusal of amendments by the trial court.

In 11th Wheaton p. 302, in Chirac v. Reinicker, Justice Story in delivering the opinion of the court, says:

"It has been decided by this court, that the allowance or disallowance of amendments is not matter for which a writ of error lies here."

In 2 Howard p. 284, Murphy et al. Admrs. v. Stewart (Matherson v. Grant). That being a case in which the record showed that the declaration contained two counts one in which plaintiff Stewart as Admr. of Alex. Grant, deceased, sued as administrator, and on the other count he sued in his own right to recover upon the same cause of action. There was a general verdict for the plaintiff, upon which judgment was rendered, said judgment being upon motion in arrest of judgment at the November term 1840, the ground of the motion being misjoinder of counts and causes of action. Thereafter at the November term 1841, counsel for plaintiff filed a motion, supported by affidavit, to set aside the order arresting judgment, and

asked to be permitted to enter a nolle prosequi as to the second count. The motion was granted and thereupon, at the November term 1841 judgment nunc pro tunc was entered upon the verdict applying it to the first count in the declaration.

In the above case, in the concluding paragraph of the opinion rendered by Judge Story, he says:

"There is yet another view of this matter. The question of the amendment was a question of discretion in the court below upon its own review of the facts in evidence; and we know of no right or authority in this court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon a survey of the facts, which seems to us to have belonged appropriately and exclusively to that court."

See also 20 Howard p. 264, Spencer v. Lapsley, wherein it is held:—

"This court has deceided that such applications are addressed to the judicial discretion of the inferior court, and its decision is not open for revision here. It has been decided that the refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial or continuance, or to reinstate a cause which has been dismissed can not be questioned for error in this court."

See also, Chapman v. Barney, 129 U. S. 677-81.

"We do not think the first assignment of error well taken, amendments are discretionary with the court below and not reviewable by this court."

Quoting from the opinion in the case of Tremaine v. Hichcock, in 90 U. S., 23 Wall. 518-529, Mr. Justice Bradley says:

"We think, therefore, that the order of the court directing that the record be amended by inserting in the bill an averment of the second re-issue was properly made, *though made after final decree. It deprived the defendants of no rights which they had not enjoyed during all of the progress of the trial. It may well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried.* It is true that an amendment which changes the character of the bill ought not generally to be allowed after a case has been set for a hearing, and still less after it has been heard. The reason is that the answer may become inapplicable if such amendment be permitted. *But in this case the defendants were not perjudiced. They had every advantage they could have had, if the bill had averred the second reissue.* The case is undoubtedly anomalous, but we think justice would not be subserved by denying to the circuit court the power to order such an amendment as was made, *after the cause was tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment.*"

We insist that the trial court did not err in permitting the plaintiff to amend his original and first amended original petitions in said cause, after judgment rendered at same term of court, record p. 28, and in support of our contention we cite this court to the case of Maddox v.

Thorn, 60 Fed. Rep., 217, which case is almost identical with the case at bar. And Judge McCormick, who rendered the opinion stated the law as follows:

* * * * "Without reviewing the authorities (which are very numerous) on the subject of the trial court's discretion to allow amendments of substance, pending a trial, without vacating the submission, we are of opinion that the provision of the statute which says any court of the United States 'may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe,' is broad enough to warrant the action of the trial judge in allowing the amendment on terms, and proceeding to judgment. This discretion is a legal discretion, and subject to review. The amendment offered was one of vital substance. The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it is most generally not contested, —is virtually admitted when properly pleaded. It is, however, necessary to be proved, unless so virtually admitted, when it is put in issue by proper pleading. It is not now material to inquire what character or amount of proof on that subject is prima facis sufficient. The pleading having been sworn to by plaintifi's counsel, who was still in court to be cross-examined if the defendant so desired, and nothing then shown by the defendants, or yet shown by them, to indicate that the discretion was improvidently exercised, we are of opinion that this assignment of error is not well taken."

We respectfully call your Honors' attention to the fact that, in the case at bar, plaintiff himself made affidavit to his motion to amend his original and first amended original petitions, and under oath stated, that he was at the date of his injuries and was when the original petition was filed and the cause tried, a *bona fide* citizen of the United States of America and of the State of Texas. Record p. 28. And that when said motion to amend was submitted to the court, the parties being then before the court and defendant making no effort to contest nor asking for any time in which to procure evidence to contest the affidavit of plaintiff acquiesced in its truthfulness, and we do not believe they can be heard to complain now. In the absence of any showing in the record that the trial Court had, as said in Maddox vs. Thorn supra, "improvidently exercised" its discretion.

We further desire to call the attention of this court to the case of Fitchburg R. Co. v. Nichols, 85 Fed. Rep., 869. In which case Judge Putnam in rendering the opinion of the court, states the law thus:

"The record in this case contains the suitable allegations to show the citizenship of the corporation defendant in the court below, but it fails in this respect as to the plaintiff below. There are only two courses open. If the plaintiff below is an allien, or a citizen of some state other than Massachusetts, the record may be amended in this court according to the truth by the consent of both parties. Fletcher v. Peck, 6 Cranch, 87,

127; Kennedy v. Bank, 8 How. 586, 611; U. S. v. Hopewell, 51 Fed. 798,800, 2 C. C. A. 510; Nashua & L. R. Corp. v. Boston & L. R. Corp., 9 C. C. A. 468, 61 Fed. 237, 245. If this is not done, the judgment of the court below must be reversed. *It is not necessary to set aside the verdict*, as the court below may allow an amendment, in accordance with the facts, to supply the defect, *as well after verdict as before*, provided it gives the adverse party an opportunity to meet the new issue thus raised, if that party is advised to do so. All this is not only in accordance with the general principles of law, but is emphasized by section 954 of the Revised Statutes, and paregraphs 1 and 3 of rule 11 of the circuit court.

We submit that the above case is directly in point with the one at bar, ours being even a stronger case, for in that case, the appellate court holds that the pleadings of plaintiff might be amended in the trail court so as to allege his citizenship, after said cause had gone to the circuit court of appeals in that defective condition, without (upon remand to the trial court) setting aside the verdict. In the case at bar plaintiff corrected the omission in his pleadings while all the parties were still in the trial court.

We contend that the Court had the power to allow the amendment to show diverse citizenship, and the exercise of the court's discretion, in permitting the amendment, *is not assignable error.*

We are constrained to believe that learned counsel for plaintiff in error are mistaken in the law governing

the practice in the United States Courts, when they contend, brief p. 22, 24, that, "amendments such as were allowed in the case at bar by the trial court are prohibited by the laws of the State of Texas, and that the courts of the United States are *governed* by the laws of the State where the litigation is had."

Mr. Cooley in his treatise on Constitutional Law, p. 32, says:

"A State law must yield to the Supreme law, whether expressed in the Constitution of the United States or any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the 'Supreme Law' was adopted or enacted afterwards."

We are aware that amendments such as were allowed in the case at bar are not permitted by the laws of this State, but inquestionably such amendment is allowed under Art. 954, R. S. U. S. Where the laws of the State and those of the United States conflict, the laws of the latter govern.

We believe that the following decisions of the Supreme Court of the United States involving the question of practice in United States Courts where same are in conflict with the laws of a State dispose of the question and conclusively show that there is nothing in the contention of counsel for plaintiff in error on that point.

In the case of Phelps v. Oaks, 117 U. S. 236, 241,

carried up from the Circuit Court of the United States for the Western District of Missouri, the Court in delivering its opinion, says:

"The Statute of Missouri provides, * * * * and it is assumed that the Statute is equally obligatory upon the Courts of the United States. But this is a mistake."

"Undoubtedly it was the duty of the circuit court in this case to give effect to the Statute of Missouri, as far as it could, but not to the extent of its jurisdiction. 'It must be held,' as was said in Erstein v. Rothschild, 22 Fed. Rep. 61, 64, 'That the body of the local law thus adopted in the general, must be considered in the Courts of the United States in the light of their own system of juris. prudence, as defined by their own Constitution as tribunals, and of the acts of Congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the Courts of the United States in each State, in reference to their own practice and proceedure, upon the footing merely of subordinate state courts, required to look from time to time to the supreme court of the State for authoritative rules for their guidance in those details. To do so would be, in many cases, to trench, in important particulars not easy to foresee, upon substantial rights, protected by the peculiar Constitution of the federal judiciary, in which might seriously affect, in cases easily supposed, the proper corelalation and indenpendence of the two systems of federal and state judicial tribunals."

And in the case of the Southern Pacific Company v.

Denton, 146 U. S. 202, 210, a case carried to this Court on writ of error from the Circuit Court of the United States for the Western District of Texas, and in which it was decided by this Court, that jurisdiction of Circuit Courts are not restricted nor enlarged by State Statutes.

Mr. Justice Gray in delivering the opinion of the Court, says, referring to Rev. Stat. Sec. 914: providing that practice, pleadings etc., in Circuit and District Court shall conform as near as may be to practice pleadings etc., in State Courts.

"In one of the earliest cases that arose under this Act, this Court said: 'The conformity is required to be' —not as near as may be possible, or as near as may be practicable. This suggestion may have been suggested by a purpose: it devolved upon the judges to be affected the duty of construing and deciding, and gave them power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." Indianapolis & St. L. R. Co. v. Horst, 92 U. S. 291, 300.

Under this Act, the Circuit Court of the United States following the practice of the courts of the State in regard to form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defenses on the merrits shall be pleaded successively or together. * * * * * * But the jurisdiction

of the circuit courts of the United States has been defined and limited by acts of Congress, and can neither be restricted nor enlarged by the Statutes of the State. * * * * * * And whenever Congres has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. Ex parte Fisk, 113 U. S. 713, 721; Whitford v. Clark County, 119 U. S. 522. * * * * * * * * * * * * To conform to such Statute of a State would "unwisely incumber the administration of the law," as well as "tend to defeat the ends of justice," in the national tribunals. The necessary conclusion is that the provisions referred to, in the practice act of the State of Texas, have no application to actions in the courts of the United States."

Plaintiff in error complains or rather seeks to sustain its position in this appeal with this statement on page 27 of their transcript "There is nothing in the record to show that defendant was given an opportunity of combating this showing (referring we a pprehend to the motion and affidavit of defendant in error for leave to amend in the lower court) "by filing counter affidavits, and the precipitancy with which the proceeding were rushed through would seem to preclude any such possibility."

With all due deference to counsel, we are constrained to say that their criticism of the action of the trial court, as to precipitancy, is as unwarranted and un-

just as is their contention or rather their ostensible contention that the record should show that they had an opportunity to contest the motion to amend. It certainly appears to us that the record should contain some evidence that plaintiff in error *did not* have an opportunity to contest the motion, and in the absence of such showing on the face of the record the presumption obtains that they had every opportunity they desired to contest the motion and the record should show affirmatively that the court acted precipitately in the matter of permitting the amendment, before plaintiff in error could be heard to say that he had been wronged by the court's action.

It must certainly be presumed that all courts act justly, upon due consideration, after full hearing and deliberately, and certainly this record fails to dis-close that the trial court acted otherwise in this case, and to overcome the presumption of fairness in the action of the court it is incumbent upon plaintiff in error to establish the fact that the court has acted unfairly or that an injustice has been done it.

We feel that no other answer to this part of the brief for plaintiff in error is necessary or becoming, than to say, that instead of their having any complaint against the action of the court on the grounds stated, the very fact that the amendment was permitted, and the record failing to show that plaintiff in error was not given an oppertunity to contest, is conclusive that the trial court acted within his discretion discreetly and that there was no abuse of that court's discretion to the in-

jury of plaintiff in error.

In conclusion we desire, with tne court's permission, to submit this motion to dismiss and affirm this cause, upon repetition of grounds hereinbefore stated as well as the following:

First: Because error will not lie from the action of the trial court in permitting amendments.

Second: Because the question by this appeal sought to be presented for consideration of the Supreme Court on which the jurisdiction depends is so frivolus as not to need further argument.

Desty's Federal Proceedure Book 2, Rule 6 of the Supreme Court, subdivision 5; Swope v. Leffingwell, 15 Otto p. 3; Bullit Co. v. Washer, 130 U. S. 142, Central Trust Co. v. Grant Locomotive Works, 135 U. S. p. 207; Northern P. R. Ry. Co. v. Austin, 135 U. S. 315; Gromley v. Bunyon, 138 U. S. 623.

Respectfully submitted,

Atty. for Defendant in Error,

J. M. DUTHIE.

Supreme Court of the United States.

No. 336.—October Term, 1902.

Mexican Central Railway Company (Limited), Plaintiff in Error, vs. J. M. Duthie. } In error to the Circuit Court of the United States for the Western District of Texas.

[April 13, 1903.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

Duthie brought suit for the recovery of damages for personal injuries in the Circuit Court of the United States for the Western District of Texas against the Mexican Central Railway Company, Limited; and in his original complaint averred that he "resides in El Paso, in El Paso County, State of Texas, in the Western District of said State;" and that defendant was a citizen of the State of Massachusetts. The cause was tried before a jury and resulted in a verdict and judgment thereon April 10, 1902. The record shows "that no further proceedings were had in said cause after the entry of said judgment until, to wit, the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition," to the effect "that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'And is a citizen of said State and of the United States of America,' after the allegation made in said pleading 'that plaintiff resides in El Paso, in El Paso County, State of Texas.'" In support of the motion plaintiff stated under oath "that he is now and was at the date of the filing of his original petition herein, and was on the 22d day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the State of Texas." The court granted leave to so amend and defendant excepted. Thereupon defendant applied to the court to certify to this court the question of jurisdiction to amend, and to retain the judgment after such amendment; and a certificate was accordingly granted.

If the complaint or petition had remained as it was originally framed, and the case had then been carried to the Circuit Court of Appeals, that court would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend. *Metcalf* v. *Watertown*, 128 U. S. 586; *Horne* v. *Hammond Company*, 155 U. S. 393.

But plaintiff, discovering the defect in the averment before the case had passed from the jurisdiction of the Circuit Court, applied and obtained leave to amend, and made the amendment. So that the only question is whether the Circuit Court had power to allow the amendment.

By section 954 of the Revised Statutes it was provided that the trial court might "at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe;" and since the trial court in the present case still had control of the record, it had jurisdiction to act, and we may add that we do not perceive that there was any abuse of discretion in permitting the amendment in the circumstances disclosed. *Mexican Central Railway Company* v. *Pinckney*, 149 U. S. 201; *Tremaine* v. *Hitchcock*, 23 Wall. 518. If the statutes of Texas forbade such an amendment, the law of the United States must govern. *Phelps* v. *Oaks*, 117 U.S. 236; *Southern Pacific Company* v. *Denton*, 146 U. S. 202.

The suggestion that defendant was cut off from trying the fact as to plaintiff's citizenship is without merit. The record does not disclose that defendant sought to contest plaintiff's affidavit, and for aught that appears the fact may have been conceded.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.